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In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO AND VINCENT CAFARO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether Section 3142(e) of the Bail Reform Act of 1984, which authorizes the pretrial detention of an indicted defendant if no release conditions "will reasonably assure * * * the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)), is unconstitutional on its face.

PARTIES TO THE PROCEEDING

The petitioner is the United States of America. The respondents are Anthony Salerno and Vincent Cafaro.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-32a), is not yet reported. The opinion of the district court (App., *infra*, 33a-57a) is reported at 631 F. Supp. 1364.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 58a-59a) was entered on July 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3142(e) of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3142(e), provides in pertinent part:

> If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.

STATEMENT

Respondents Anthony Salerno, the reputed leader of the Genovese organized crime family, and Vincent Cafaro, a reputed "captain" in that organization (see App., *infra*, 3a, 35a), are presently charged with various racketeering offenses and violent crimes. The United States sought pretrial detention of respondents pursuant to Section 3142(e) of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3141 *et seq.*, which authorizes the detention of a criminal suspect charged with a crime of violence if no release conditions "will reasonably assure * * * the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)). The district court ordered the detention of respondents based on the government's "overwhelming" evidence that, if released, they would continue to engage in violent criminal behavior (App., *infra*, 47a, 55a). The court of appeals agreed that no condition of release would reasonably assure the safety of other persons and the community (*id.* at 13a). It nevertheless reversed, holding that Section 3142(e)'s authorization of pretrial detention based upon a judicial determination of future dangerous-

ness is facially unconstitutional as a violation of substantive due process (App., *infra*, 15a).

1. The Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3141 *et seq.*, revises the federal law governing pretrial release of criminal suspects. Section 3141 of the Act provides that a judicial officer shall determine whether an arrested person will be released or detained in accordance with the provisions of the Act. 18 U.S.C. (Supp. II) 3141. Section 3142(a) sets forth the available options. See 18 U.S.C. (Supp. II) 3142(a). The judicial officer may order that the person be: (1) released on his own recognizance or upon execution of an unsecured bond;[1] (2) released subject to various specified conditions;[2] (3) temporarily detained to permit revocation of a prior release order, deportation or exclusion;[3] or (4) detained pursuant to the provisions of subsection (e). *Ibid.*

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[1] An arrested person qualifies for unsecured release unless "the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. (Supp. II) 3142(b).

[2] A suspect is subject to conditional release if the judicial officer determines that the person does not qualify for release upon his own recognizance or upon execution of an unsecured bond. 18 U.S.C. (Supp. II) 3142(c). Section 3142(c)(1) imposes a mandatory condition that the person refrain from violating federal, state, or local law. 18 U.S.C. (Supp. II) 3142(c)(1). It also describes some of the other monetary and nonmonetary release conditions that may be utilized. 18 U.S.C. (Supp. II) 3142(c)(2). The judicial officer must select "the least restrictive * * * conditions, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community" (*ibid.*).

[3] The judicial officer may detain a person for up to ten days, to allow notice to the proper authorities, if the person

Section 3142(e) provides that "[i]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." 18 U.S.C. (Supp. II) 3142(e). Upon the government's request, the judicial officer must hold a pretrial detention hearing in cases involving crimes of violence, offenses that may result in a sentence of life imprisonment or death, serious drug-related crimes, and felonies committed by persons who have previously been convicted of other serious crimes. 18 U.S.C. (Supp. II) 3142 (f)(1). In addition, the judicial officer must hold a pretrial detention hearing, in response to a government request or upon his own motion, in cases involving a serious risk that the person will flee or attempt to obstruct justice. 18 U.S.C. (Supp. II) 3142(f)(2).

Section 3142(f) also specifies a series of procedural safeguards that accompany the pretrial detention hearing. The person resisting detention may request the presence of legal counsel at the hearing, may testify and present witnesses on his own behalf, may cross-examine other witnesses who appear at the hearing, and may present evidence by proffer. 18 U.S.C. (Supp. II) 3142(f). A judicial officer's findings that no conditions will reasonably assure the safety of other persons and the community "shall be supported by clear and convincing evidence" (*ibid.*).

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poses a risk of flight or danger to other persons or the community and is (1) on release pending trial or appeal; (2) on probation or parole; or (3) subject to deportation or exclusion under the immigration laws. 18 U.S.C. (Supp. II) 3142(d).

Section 3142(g) specifies the factors that a judicial officer shall take into account in considering whether to detain a criminal suspect. See 18 U. S.C. (Supp. II) 3142(g). These factors include the nature and seriousness of the charges, the weight of the evidence against the suspect, the history and characteristics of that person, and the nature and seriousness of the danger to any person or the community that would be posed by his release (*ibid.*). Finally, Section 3142(i) specifies the required contents of a detention order. See 18 U.S.C. (Supp. II) 3142(i). The order must include written findings of fact and a statement of reasons for the detention, it must provide that the person detained be separated to the extent practicable from persons awaiting or serving sentences, and it must direct that the person be afforded a reasonable opportunity for private consultation with his lawyer and be made available for necessary court appearances (*ibid.*).

2. On March 20, 1986, a federal grand jury returned a 29-count indictment charging respondents and 13 other members and associates of the Genovese organized crime family with various crimes, including conspiracy and substantive racketeering offenses (18 U.S.C. 1962(c) and (d)); 16 counts of mail fraud (18 U.S.C. 1341) in connection with a construction industry bid-rigging scheme; wire fraud (18 U.S.C. 1343) in connection with the election of Roy L. Williams as General President of the International Brotherhood of Teamsters; seven counts of extortion (18 U.S.C. 1951) from a New York area food company; and the operation of illegal numbers and bookmaking businesses (18 U.S.C. 1955). See App., *infra*, 2a-3a, 35a-36a. The racketeering counts of the indictment allege 35 specific racketeering

acts, including two separate murder conspiracies (*id.* at 2a-3a).

Respondents were arrested and arraigned on March 21, 1986. The United States immediately moved for pretrial detention pursuant to 18 U.S.C. (Supp. II) 3142(e), and the district court (Walker, J.) held an evidentiary hearing in accordance with 18 U.S.C. (Supp. II) 3142(f). The government submitted evidence demonstrating that respondents have engaged in a continuing course of illegal and violent activity and that no conditions of release would prevent respondents from resuming those activities during the pendency of their trial. The government provided a detailed proffer of anticipated testimony from trial witnesses and evidence obtained through electronic surveillance to demonstrate that respondents posed a continuing danger to the community that justified pretrial detention. See App., *infra*, 2a-4a, 34a-45a.

For example, the government disclosed in its proffer that Jimmy Fratianno, a federal witness, would testify that he attended a meeting with high-ranking members of the Genovese family at which respondent Salerno and others agreed to place a "contract" for the murder of John Spencer Ullo, a California organized crime figure (App., *infra*, 37a-38a).[4] The government also disclosed that Angelo Lonardo, another federal witness who is the former "underboss" of the Cleveland organized crime family and a life-long friend of Salerno, would testify that Salerno participated in the decision to murder John Simone, a Philadelphia organized crime figure, and the separate decision to murder Danny Greene and John Nardi,

[4] This murder conspiracy ultimately failed because Ullo learned of the plan and killed the person who had been dispatched to fulfill the contract (App., *infra*, 38a).

two Cleveland organized crime figures (*id.* at 38a-39a).[5] In addition, the government disclosed evidence obtained through electronic surveillance demonstrating that Salerno and Cafaro routinely used violence to maintain control over the Genovese family's gambling, loansharking, and labor union activities (*id.* at 39a-44a).

In response, Salerno offered testimony from character witnesses and challenged the credibility of the government witnesses. Cafaro offered no evidence and contended that the electronic surveillance evidence revealed, at most, only "tough talk." App., *infra*, 44a-45a.

The district court, characterizing the evidence as "overwhelming" (App., *infra*, 47a, 55a), found that the government had established by clear and convincing evidence that "Salerno is the head, or 'Boss,' of an organization engaged in extortion, loansharking, illegal gambling, and murder" (*id.* at 47a-48a) and that "Cafaro has directed violent acts and is ready, willing and able to direct violent acts in the future" (*id.* at 55a). The court concluded (*id.* at 56a-57a):

> The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of [the criminal

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[5] Simone's body was found on a roadside in Staten Island, shot three times in the head (App., *infra*, 38a-39a). The plot to kill Greene and Nardi contemplated their murder in New York. However, they ultimately died in car bombings in Cleveland (*id.* at 39a).

> enterprise's] leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose to the community is self-evident.
>
> Thus, after carefully considering all the factors enumerated in 18 U.S.C. section 3142(g), this court finds that the government has met its burden of proof by clear and convincing evidence that no condition or combination of conditions of release of these defendants will reasonably assure the safety of any other person or of the community.

The court entered an order detaining respondents.[6]

Respondents sought reconsideration of the detention decision, which the district court (Lowe, J.) denied (App., *infra*, 6a-7a). They then sought review from the court of appeals. That court first rejected Salerno's argument that the government had provided insufficient notice of its intent to use wiretap evidence, holding that Salerno lacked standing to seek suppression of that evidence (*id.* at 9a-12a). The court further concluded (*id.* at 13a) that the evidence proffered by the government "amply supported the court's findings that the government had proven by clear and convincing evidence that Salerno 'is a danger to the community as the 'Boss' of an organization that uses force, violence, and threats of

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[6] The district court issued a detention order on March 28, 1986. However, that order was not entered on the court's criminal docket. See App., *infra*, 8a. The district court later issued a virtually identical order on April 2, 1986, which was entered on the court's docket on April 7, 1986 (*ibid.*). That order, which the court of appeals treated as the relevant decision (*ibid.*), is reproduced in the appendix to this petition (*id.* at 33a-57a).

force and violence to further its illegal operations,' [quoting *id.* at 48a], and that Cafaro 'has directed violent acts and is ready, willing and able to direct violent acts in the future' [quoting *id.* at 55a]." The court nonetheless reversed the district court's detention decision, concluding that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community" (*id.* at 14a).

The court agreed that a judicial officer may order pretrial detention in response to "risk of flight or threats to potential witnesses, jurors, or others involved in the judicial process" (App., *infra*, 14a). It stated, however, that "[t]he sole bases for the detention order in this case are the findings that the defendants would, if released, carry on 'business as usual' notwithstanding any release conditions, and that business as usual involves threats and crimes of violence" (*id.* at 15a). The court concluded that detention for the purpose of protecting community safety is "repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes" (*ibid.*). The court reasoned that, under the Due Process Clause, " 'incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes.' " *Id.* at 17a (emphasis in original omitted) (quoting Judge Newman's separate opinion in *United States* v. *Melendez-Carrion*, 790 F.2d 984, 1001 (2d Cir. 1986)). The court stated that "[e]ven the risk of some serious crime, such as destruction of an airliner * * * must, under our Constitution, be guarded against by surveillance of the suspect and prompt trial on any pending charges, and not by in-

carceration simply because untested evidence indicates probable cause to believe that he has committed one crime and is a risk to commit another one" (App., *infra*, 20a).

Chief Judge Feinberg dissented (App., *infra*, 23a-32a). He concluded that "detaining indicted defendants under the Bail Reform Act for a limited time on the basis of clear and convincing evidence that nothing short of confinement will prevent them from violating the law while on release does not violate any norm of decency implicit in the concept of ordered liberty, and does not violate the Due Process Clause" (*id.* at 29a). He relied, in part, on this Court's holding in *Schall* v. *Martin*, 467 U.S. 253 (1984), that pretrial detention of juveniles based on their perceived danger to the community is compatible with due process (App., *infra*, 24a-25a), observing that the societal interest in protecting the public from violent crime "does not vary in strength with the age of the person to be detained" and that, "[i]f anything, the need to shield the community from the hazards of pretrial crimes committed by adults is more compelling, since adults may have superior access to the means of committing more serious and far-reaching offenses" (*id.* at 25a).

Judge Feinberg added that while "[d]ue process also dictates that the government not pursue its goals through 'conduct that shocks the conscience' " (App., *infra*, 26a, quoting *Rochin* v. *California*, 342 U.S. 165, 172 (1952)), "[t]here is nothing inherently shocking to the conscience in using a prediction of future criminality to justify confinement" (App., *infra*, 26a). He also concluded that the statutory pretrial detention provisions, as applied in this case, are consistent with due process (*id.* at 29a-32a).

REASONS FOR GRANTING THE PETITION

This case presents a question of great importance to the administration of the criminal law. The court of appeals' holding that the recently enacted pretrial detention provisions of the Bail Reform Act are facially unconstitutional directly frustrates Congress's attempt to protect the public from "a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons." S. Rep. 98-225, 98th Cong., 1st Sess. 6-7 (1983). The court of appeals' decision conflicts with the decisions of other courts of appeals and reflects a dramatic—and erroneous—expansion of the concept of substantive due process. This Court's review is plainly warranted.

1. Congress enacted the pretrial detention provisions of the Bail Reform Act in response to public concern, echoed by the President, the Chief Justice, and the American Bar Association, over the "alarming problem of crimes committed by persons on release" (S. Rep. 98-225, *supra*, at 3, 5-6). The Senate Committee on the Judiciary, which held extensive hearings on the matter (*id.* at 5 n.4), noted that the "broad base of support for giving judges the authority to weigh risks to community safety in pretrial release decisions is a reflection of the deep public concern, which the Committee shares, about the growing problem of crimes committed by persons on release" (*id.* at 6).

The Committee recognized that pretrial raises constitutional questions (S. Rep. 98-225, *supra*, at 7-8), but it ultimately determined, based on its own constitutional analysis and the experience gained under

the preventive detention provisions of the District of Columbia Code (D.C. Code Ann. § 23-1322 (1981 & Supp. 1985)) that "pretrial detention is not *per se* unconstitutional" (S. Rep. 98-225, *supra*, at 8). It concluded that "pretrial detention is a necessary and constitutional mechanism for incapacitating, pending trial, a reasonably identifiable group of defendants who would pose a serious risk to the safety of others if released" (*id.* at 10).[7]

The Committee formulated the preventive detention provisions with care, observing that, while pretrial detention is not per se unconstitutional, "a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect" (S. Rep. 98-225, *supra*, at 8). The Committee stated that "[t]he pretrial detention provisions of this section have been carefully drafted with these concerns in mind" (*ibid.*). The elaborate procedural safeguards embodied in Section 3142 (see, *e.g.*, pages 3-5, *supra*) reflect those efforts.

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[7] The Committee acknowledged evidence that courts had historically detained dangerous defendants through the imposition of extremely high monetary conditions (S. Rep. 98-225, *supra*, at 10-11). Criticizing that practice, the Committee stated (*id.* at 11):

> Providing statutory authority to conduct a hearing focusing on the issue of a defendant's dangerousness, and to permit an order of detention where a defendant poses such a risk to others that no form of conditional release is sufficient, would allow the courts to address the issue of pretrial criminality honestly and effectively. * * * The new bail procedures promote candor, fairness, and effectiveness for society, the victims of crime—and the defendant as well.

Thus, Congress gave extensive consideration to the use of preventive detention and attempted to strike a balance between the government's compelling interest in protecting the public from crime and the defendant's interest in retaining his freedom prior to trial. The court of appeals' blanket conclusion that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community" (App., *infra*, 14a) completely sweeps aside Congress's effort to accommodate these important competing interests. The court's determination that this significant and carefully considered federal statute is facially unconstitutional has broad national implications that plainly justify this Court's review.

The court of appeals' decision not only strikes down an important Act of Congress, it also conflicts with the decisions of at least two other courts of appeals. Both the Third Circuit and the Seventh Circuit have rejected due process challenges to the Bail Reform Act's preventive detention provisions. See *United States* v. *Perry*, 788 F.2d 100 (3d Cir. 1986); *United States* v. *Portes*, 786 F.2d 758 (7th Cir. 1985); *United States* v. *Accetturo*, 783 F.2d 382 (3d Cir. 1986). See also *United States* v. *Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc) (upholding the District of Columbia's preventive detention statute), cert. denied, 455 U.S. 1022 (1982). This Court's review is necessary to resolve the conflict.[8]

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[8] On May 2, 1986, the Second Circuit reversed a district court's detention order on due process grounds in a case that produced three separate—and inconsistent—opinions from the panel. *United States* v. *Melendez-Carrion*, *supra*. The government petitioned for rehearing with a suggestion for rehearing en banc. On June 20, 1986, the court of appeals denied that request without opinion. Thus, it appears that the Second Circuit is unwilling to address this issue en banc.

2. On the merits, we submit that the court of appeals erred in concluding that the Bail Reform Act's preventive detention provisions violate the principles of substantive due process.

The due process inquiry begins from the fundamental premise that federal statutes enjoy a presumption of validity.[9] Deference to legislative judgment is particularly appropriate in a case such as this one, where Congress has identified and considered potential due process objections and has carefully drafted the legislation to satisfy constitutional requirements. Cf. *Walters* v. *National Association of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 13-14.

Even in the absence of the deference due to "the duly enacted and carefully considered decision of a coequal and representative branch of our Government" (*Walters*, slip op. 13), this Court's decisions demonstrate that preventive detention, subject to appropriate procedural protections, comports with due process. The commands of due process reflect " 'the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.' " *Moore* v. *City of East Cleveland*, 431 U.S. 494, 501 (1977) (plurality opinion) (quoting *Poe* v. *Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting)).

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[9] It is, of course, "by now, absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a "superlegislature to weigh the wisdom of legislation" * * * .' " *Exxon* v. *Governor of Maryland*, 437 U.S. 117, 124 (1978) (quoting *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963)). "Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." *Bowers* v. *Hardwick*, No. 84-140 (June 30, 1986), slip op. 8. See also, *e.g.*, *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion).

See also *Palko* v. *Connecticut*, 302 U.S. 319, 325-326 (1937) (due process recognizes rights "implicit in the concept of ordered liberty"). In the criminal context, this balance, like the balance struck by the Fourth Amendment, "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein* v. *Pugh*, 420 U.S. 103, 112 (1975).

"The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted." *Schall* v. *Martin*, 467 U.S. 253, 264 (1984) (quoting *De Veau* v. *Braisted*, 363 U.S. 144, 155 (1960)). And "there is nothing inherently unattainable about a prediction of future criminal conduct" (*Schall*, 467 U.S. at 278-279). Thus, the use of pretrial detention, accompanied by appropriate procedural safeguards, in instances where "no condition or combination of conditions will reasonably assure * * * the safety of * * * the community" (18 U.S.C. (Supp. II) 3142(e)) is neither an "'arbitrary imposition[]'" nor a "'purposeless restraint[]'" (*Moore*, 431 U.S. at 502 (plurality opinion) (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)). Furthermore, the use of pretrial detention to protect the public from an immediate threat of harm certainly does not "shock[] the conscience" (*Rochin* v. *California*, 342 U.S. 165, 172 (1952)). Indeed, this Court has approved the use of preventive detention in closely analogous circumstances.

The court of appeals did not dispute that the government, in administering criminal justice, may impose substantial pretrial restraints on personal liberty. See App., *infra*, 14a-15a. The accommodations between the criminal justice system and a suspect's pretrial liberty are familiar features of the criminal

law.[10] The court of appeals nevertheless concluded that pretrial detention to protect the public from the proven dangers posed by a defendant is per se violative of substantive due process (*id.* at 15a-17a). That conclusion, which rejects any balancing of governmental and personal interests, conflicts with the approach consistently employed by this Court in analyzing statutory restraints on liberty challenged on substantive due process grounds.

In *Schall* v. *Martin*, *supra*, this Court rejected a due process challenge to New York's juvenile preventive detention statute, stating that the law "serves the legitimate state objective, held in common with every State in the country, of protecting both the juvenile and society from the hazards of pretrial crime" (467 U.S. at 274). Similarly, in *Greenwood* v. *United States*, 350 U.S. 366 (1956), this Court upheld the constitutionality of a federal statute authorizing pretrial detention of a potentially dangerous mentally incompetent defendant, stating that "the legislation authorizing commitment in the context of this case, involve[s] an assertion of authority, duly guarded, auxiliary to incontestable national power" (*id.* at 375). In *Shaughnessy* v. *Mezei*, 345 U.S. 206 (1953), this Court permitted the indefinite detention of a potentially dangerous resident alien upon his

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[10] See, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 534 (1979) (a judicial officer may detain a suspect to ensure his appearance at trial); *Gerstein*, 420 U.S. at 113-114 (police officer's assessment of probable cause provides legal justification for arrest and "a brief period of detention to take the administrative steps incident to arrest"); *United States* v. *Gotti*, No. 86-1230 (2d Cir. June 25, 1986), slip op. 4336-4337 (a court may detain a defendant to prevent him from intimidating witnesses).

return from a foreign country until an exclusion hearing could be held (*id.* at 215-216). Justice Jackson, dissenting in part, rejected the notion that "the concept of due process [is] so paralyzing that it forbids all detention of an alien as a preventive measure against threatened dangers and makes confinement lawful only after the injuries have been suffered" (*id.* at 223). Likewise, in *Carlson* v. *Landon*, 342 U.S. 524 (1952), this Court upheld the detention of a potential dangerous deportable alien prior to his deportation hearing.

As these cases demonstrate, the use of pretrial detention to protect the public from particularly dangerous persons does not offend the "concept of ordered liberty" (*Palko*, 302 U.S. at 325) or values "rooted in this Nation's history and tradition" (*Moore*, 431 U.S. at 503 (footnote omitted) (plurality opinion)).[11] Pretrial detention may be used to protect the public as well as the judicial process. Indeed, the court of appeals' contrary conclusion (App., *infra*, 14a-15a) would lead to strikingly anomalous results. A court could detain the mentally incompetent—but not the intentionally vicious—dangerous defendant. It could detain an alleged street criminal who threatens a judge, juror, or witnesses, but it would have to release a suspected terrorist who threatens the President, a congressman, or the public at large. Neither the sense nor the history of this Court's substantive due process jurisprudence compels these incongruous results.

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[11] Notably, the Bail Reform Act provides far more procedural due process protections than any of the detention statutes involved in the cases cited above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1986

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AUGUST TERM, 1985

Nos. 1386, 1387

Docket Nos. 86-1197, -1198

UNITED STATES OF AMERICA, APPELLEE

—*v.*—

ANTHONY SALERNO and VINCENT CAFARO,
DEFENDANTS-APPELLANTS

(Argued: May 29, 1986 Decided: July 3, 1986)

Before: FEINBERG, *Chief Judge*, NEWMAN and KEARSE, *Circuit Judges*.

KEARSE, *Circuit Judge*:

Defendants Anthony Salerno and Vincent Cafaro appeal from orders of the United States District Court for the Southern District of New York committing them to the custody of the Attorney General for pretrial detention pursuant to the Bail Reform

Act of 1984 (the "Bail Reform Act" or "Act"), 18 U.S.C. §§ 3141-3156 (Supp. II 1984), on the ground that no condition or combination of conditions of their release will reasonably assure the safety of any other person and the community. On appeal, defendants raise statutory and constitutional challenges to their continued confinement. We find no merit in their statutory arguments but agree that to the extent that § 3142(e) of the Act permits their pretrial detention on the stated ground, that section violates the Due Process Clause of the Constitution of the United States. We therefore vacate the orders of the district court, remand for the setting of conditions of bail, and stay the issue of the mandate until the mandate of this Court is issued in *United States v. Melendez-Carrion, Nos.* 85-1341, *et al.*, slip op. 3023 (2d Cir. May 2, 1986).

I. BACKGROUND

Salerno and Cafaro were arrested on March 21, 1986, and have been incarcerated since that date. They were charged, along with 13 others, in a 29-count indictment with one count of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), in violation of 18 U.S.C. § 1962(d) (1982); one count of participating in a racketeering enterprise, in violation of 18 U.S.C. § 1962(c) (1982); 16 counts of mail fraud, in violation of 18 U.S.C. § 1341 (1982); one count of wire fraud, in violation of 18 U.S.C. § 1343 (1982); eight counts of extortion, in violation of 18 U.S.C. § 1951 (1982); and one count of operating an illegal bookmaking business and one count of operating an illegal numbers business, in violation of 18 U.S.C. § 1955 (1982). The RICO counts allege 35 specific acts of

racketeering activity, including the alleged mail and wire frauds, extortion, and gambling, and two conspiracies to commit murder.

A. *The Initial Decision by Judge Walker*

At the arraignment of Salerno and Cafaro before Judge John M. Walker, Jr., sitting as Part I Judge, the government moved for their pretrial detention pursuant to 18 U.S.C. § 3142(e). The government conceded that neither defendant posed a risk of flight, but it contended that no condition of bail or combination of conditions would assure the safety of the community or any person. After a three-day continuance at the request of the government, Judge Walker conducted an evidentiary hearing.

At the hearing, the government submitted to the court a lengthy and detailed proffer of evidence derived from court-ordered electronic surveillance at various locations and from the anticipated testimony of two of the government's trial witnesses. The proffer indicated that Salerno was the "boss" of the Genovese Crime Family of La Costra Nostra, that Cafaro was a "captain" in the Genovese Family, and that the two had participated in conspiracies to use violence in seeking to, *inter alia*, eliminate competition for their gambling operations, collect moneys in the course of their loansharking business, and control labor unions. The proffer also indicated that the expected testimony of the two witnesses, former high-ranking members of organized crime who had testified for the government at trials of other organized crime figures, would show Salerno's participation in conspiracies to murder two named individuals. Tapes of electronic surveillance also disclosed Salerno's approval of at least one other plan to commit murder.

Salerno, in opposition to the motion for detention, suggested that the government's key witnesses were subject to impeachment on the basis of their criminal pasts and their favorable cooperation agreements with the government, and he proffered the testimony of witnesses who, while denying knowledge relating to any of the allegations in the indictment, would state that they did not consider Salerno to be any danger to the community. Salerno also produced a letter from his doctor, who had attended him since 1977, stating that Salerno, age 74, has had a history of high blood pressure complicated by congestive heart failure since 1961 and that his condition has resulted in serious vascular damage which, despite a strict medical regimen, has progressed. The doctor noted also that in 1981 Salerno suffered a stroke from which he has recovered with some limited residual disability.

Cafaro presented no evidentiary material at the hearing. He relied on argument [*sic*] that the government's tape recordings of his threats of violence and counseling of others to use violence revealed at most "tough talk" and that the government had offered no proof that any of the violent acts discussed by him were actually carried out.

After the two-day hearing, the court granted the government's motion for detention in an Opinion and Order dated March 28, 1986 ("March 28 Order"), which apparently was not filed but was modified by an Opinion and Order filed on April 2, 1986 ("April 2 Opinion"). In the April 2 Opinion, the court reviewed in detail the government's proffer with respect to the defendants' use or threatened use of violence and concluded that the government had established by clear and convincing evidence that no condition or combination of conditions of release would ensure the

safety of the community or any person in the community. As to Salerno, the court noted, *inter alia*, that

> [t]he government has proffered information showing that Salerno could order a murder merely by voicing his assent with the single word "hit." Although some of these murder conspiracies occurred between six and ten years ago, their seriousness and the ease with which they could be ordered weigh heavily in favor of finding that Salerno is a present danger to the community.

[App., *infra*, 48a]. The court noted that the release conditions proposed by Salerno, which included so-called "house arrest" and an order not to commit crimes or intimidate witnesses, closely paralleled those found inadequate in *United States v. Colombo*, 777 F.2d 96 (2d Cir. 1985), and it concluded that Salerno should remain detained pending trial.

As to Cafaro, the court found that the government had "established by clear and convincing evidence that Cafaro was actually conducting the business of the enterprise and that he did so by directing others to commit violent acts." [App., *infra*, 55a]. The court concluded that the release conditions proposed by Cafaro, which were that he surrender his passport and not be allowed to go to specified restaurants, social clubs, and offices, or to associate with other defendants, would at most assure Cafaro's presence at trial but would in no way assure the safety of the community:

> The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even

> the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose in the community is self-evident.

[App., *infra*, 56a-57a]. The court stated that "this court cannot envision any set of conditions that could ensure the safety of the community from Cafaro." [*Id.* at 56a].

Accordingly, the court ordered that Salerno and Cafaro be committed to the custody of the Attorney General for confinement prior to trial. To the extent practicable, defendants were to be confined in a corrections facility separate from persons awaiting or serving sentences or being held in custody pending appeal, and were to be afforded reasonable opportunity for private consultation with their respective attorneys.

B. *The Decision by Judge Lowe*

While the government's motion was pending before Judge Walker as Part I judge, the present prosecution was assigned by lot to Judge Mary Johnson Lowe for trial. On April 1 defendants asked Judge Lowe to review the March 28 detention order announced by Judge Walker and thereafter made a more formal motion for review of both the March 28 Order and the final detention order embodied in the April 2 Opinon. Followng a hearing on April 11, Judge Lowe denied defendants' motion. She ruled that Judge Walker's findings were not subject to *de novo* review

and that there was no new evidence sufficient to warrant disturbing those rulings.

Defendants have filed notices of appeal seeking review of the orders of Judges Walker and Lowe.

C. *Issues on Appeal*

Defendants raise several issues on appeal. Salerno contends that the government's reliance on the fruits of electronic surveillance without giving him 10 days' notice violated the provisions of 18 U.S.C. § 2518(9) (1982). Both defendants contend that the evidence was insufficient under the standards set by 18 U.S.C. § 3142(f) to support the district court's findings, and that to the extent that § 3142(e) of the Bail Reform Act permits their pretrial detention solely on the ground that they are likely to commit further crimes against the community, the Act violates their right to due process. The government contends that to the extent that defendants seek review of Judge Walker's March 28 Order, the notices of appeal were not timely filed, and this Court thus lacks jurisdiction to review that order.

We conclude that Judge Walker's detention order is properly before us and we thus reject the government's jurisdictional argument. We also reject defendant's statutory contentions, but we find merit in their constitutional attack on § 3142(e) of the Bail Reform Act in the present circumstances.

II. JURISDICTION

The government challenges our jurisdiction to review Judge Walker's March 28 Order on the ground that defendants' notices of appeal were not filed until April 21, 1986. Rule 4(b) of the Federal Rules of Appellate Procedure provides that

> [i]n a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. . . . A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket.

Notwithstanding a welter of confusing dates, it appears that, given the sequence of events below, defendants' notices of appeal were timely filed.

First, although the notices of appeal list the March 28 Orders as among those of which review is sought, that order was never entered in the court's criminal docket. Instead, it apparently was superseded by the order dated April 2, 1986, which was embodied in the April 2 Opinion. The April 2 Opinion was entered in the criminal docket on April 7. Thus the 10-day appeal period began on April 7.

Second, although defendants' notices of appeal bear the typed and handwritten date April 21, 1986, and were not docketed until April 23, the notices are officially stamped as having been filed in the Southern District Clerk's Office on April 16, 1986. The docket entries also state that the notices of appeal were filed on April 16. Thus, it appears that the notices were filed within the 10-day period after the docketing of Judge Walker's final detention order. They are timely to give us jurisdiction to review that order.

III. STATUTORY ISSUES

Defendants contend that the detention order was entered in violation of various statutory provisions. We have considered all of defendant's statutory arguments and conclude that none of them has merit. Only two warrant discussion: (1) that the court

should have rejected the government's proffer against Salerno of an electronically intercepted conversation because the government had failed to provide him, in advance of the detention hearing, with certain surveillance information pursuant to 18 U.S.C. § 2518 (9); and (2) that the evidence was insufficient to support the court's finding pursuant to 18 U.S.C. § 3142 that they pose a danger to the community.

A. *The Intercepted Conversation*

Part of the government's proof against Salerno was its proffer of a recording of a conversation in a construction trailer in Edgewater, New Jersey, obtained through a court-ordered electronic surveillance ("Edgewater surveillance"). Section 2518(9) of Title 18 provides that

> [t]he contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

Salerno argues that because the government failed to provide him with the Edgewater surveillance applica-

tion and order 10 days before the detention hearing, the court should have rejected the government's proffer of the contents of the intercepted conversation. We disagree.

Preliminarily, however, we note our disagreement with the government's primary argument as to why we should reject Salerno's contention. The government argues that § 2518(9) has no applicability to detention hearings under the Bail Reform Act because, in light of the Act's provision that such a hearing should be held not later than five days after a defendant's first appearance before a judicial officer, *see* 18 U.S.C. § 3142(f), compliance with § 2158(9) prior to such a hearing would be impossible. We think it clear that Congress intended § 2518(9) to apply to detention hearings and we do not find the two provisions irreconcilable. On its face, the language used by Congress—"any trial, hearing, or other proceeding in a Federal or State court"—plainly seems broad enough to include a hearing on a pretrial detention motion. Further, the legislative history of § 2518(9) states that the term " '[p]roceeding' is intended to include all adversary type hearings." S. Rep. No. 1097, 90th Cong., 2d Sess. 105, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2195 ("Senate Report"). We have no doubt that Congress views a detention hearing as an adversary type hearing. It provided in the Bail Reform Act that at such a hearing a defendant is entitled, *inter alia*, to be represented by counsel, to have counsel appointed for him if he is indigent, and to "be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise." 18 U.S.C. § 3142(f). Thus we conclude

that Bail Reform Act detention hearings are proceedings to which § 2518(9) was intended to apply.

This intention is not vitiated by the fact that § 3142(f) schedules a defendant's initial detention hearing to be held before the 10-day period would normally expire. Appropriate means of coordinating the two sections to achieve the purposes of each are found in the terms of the sections themselves. Thus, § 2518(9) authorizes the judge to waive the 10-day period if he finds that it was not possible for the government to furnish the defendant with the required information so far in advance of the proceedings and that the defendant will not be prejudiced by the delay. And § 3142(f) allows the court, in scheduling the detention hearing, to grant a continuance of longer than the normal maximum length (five days on defendant's motion, three days on the government's motion) for good cause, which would presumably include prejudice to the defendant resulting from the government's inability to have provided him earlier with the surveillance order and application.

Nonetheless, we find no violation of § 2518(9) here. The purpose of that section's 10-day provision is "to afford the defendant 'an opportunity to make a pretrial motion to suppress . . . .'" *United States v. Melendez-Carrion*, slip op. at 3039 (quoting Senate Report at 105-06, 1968 U.S. Code Cong. & Ad. News at 2195). Such a motion may be made, however, only by an "aggrieved person," § 2518(10)(a), *i.e.*, "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed," § 2510(11). A person who was not named in the wiretap order and was not a party to any conversation intercepted during that tap is not an "aggrieved person" and may not

move to suppress information derived from it. *United States v. Fury*, 554 F.2d 522, 525-26 (2d Cir. 1977); *see Alderman v. United States*, 394 U.S. 165, 175 & n.9 (1969) ("aggrieved person" language adopted existing standing rule that Fourth Amendment rights may not be asserted vicariously).

As the district court found, Salerno was not named in the Edgewater surveillance order and was not a party to the intercepted conversation. Accordingly, he had no standing to seek its suppression and was not prejudiced by the government's inability to provide him with the surveillance application and order 10 days prior to the detention hearing.

B. *Sufficiency of the Evidence*

The Bail Reform Act authorizes detention pending trial where "no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community. . . ." 18 U.S.C. § 3142 (e). The burden is on the government to prove that pretrial release of the defendant will pose a danger to any person or the community, and it must prove the facts underlying this contention by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985).

The district court's conclusion that the defendant poses a danger to the community, as well as its ultimate determination that only confinement will assure the safety of other persons and the community, normally must be upheld if not clearly erroneous. *United States v. Gotti*, No. 86-1230, slip op. 4325, 4334-36 & n.4, (2d Cir. June 25, 1986); *Melendez-Carrion*, slip op. at 3039; *Colombo*, 777 F.2d at 100. Where, as in this case, the future misconduct that is anticipated concerns violent criminal activity, no issue

arises concerning the outer limits of the meaning of "danger to the community," an issue that would require a legal interpretation of the applicable standards.

Within this framework we find no basis for overturning the district court's findings or conclusions. The evidence proffered by the government, as set forth above, amply supported the court's findings that the government had proven by clear and convincing evidence that Salerno "is a danger to the community as the 'Boss' of an organization that uses force, violence, and threats of force and violence to further its illegal operations," [App., *infra*, 48a], and that Cafaro "has directed violent acts and is ready, willing and able to direct violent acts in the future," [*id.* at 55a].

Nor do we see any error in the district court's application of the terms of the Bail Reform Act to the facts found and its conclusion that the conditions of release proposed by the defendants were inadequate to prevent defendants from resuming the conduct of "business as usual." The conditions proposed by Salerno were not significantly different from those this Court found inadequate in *United States v. Colombo*, 777 F.2d 96; and the conditions proposed by Cafaro would have been substantially less effective.

We conclude that the detention order did not violate the Bail Reform Act.

IV. THE CONSTITUTIONAL ISSUE

Defendants' principal constitutional contention is that the Bail Reform Act violates due process insofar as § 3142(e) permits pretrial detention of a defendant on the ground that his release would pose a danger to the community or any person. We agree. The government makes no claim that pretrial detention may be upheld as a punishment. Detention could

not be imposed as punishment in the absence of an adjudication of guilt. *See Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979). Instead the government contends that pretrial detention on the ground of dangerousness may be constitutionally imposed as a regulatory measure to protect public safety. In *United States v. Melendez-Carrion*, a majority of the panel held § 3142 (e) unconstitutional as applied to two defendants detained before trial for a period in excess of eight months on the ground of danger to the community. The panel majority was internally divided, however, with Judge Newman holding that danger to the community may not constitutionally justify pretrial detention as a regulatory measure and Chief Judge Feinberg holding that such detention had become unconstitutional punishment because of the length of the detention that had occurred. In the present case, a majority of the panel is in agreement that the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure, without regard to the duration of the detention.

At the outset we note that the present detention order does not hinge on risk of flight or threats to potential witnesses, jurors, or others involved in the judicial process. The government conceded at the detention hearing that there was no risk that the defendants would flee and not appear for trial. Nor was there any finding by the court that the defendants were likely to tamper with or intimidate witnesses or jurors, or otherwise to jeopardize the trial process. We recognize that pretrial detention may be validly imposed when substantial evidence indicates that a defendant, if released, would commit such acts. *See Melendez-Carrion*, slip op. at 3057-58 (Newman,

J.) ("Pretrial detention to avoid undue risks of flight or jeopardy to the trial process [is] not prohibited by a constitutional scheme that relies on the trial process to determine guilt and enforce the criminal law."); *cf. United States v. Gotti* (defendant's release may be revoked pursuant to § 3148 of the Act if it is established by a preponderance of the evidence that no conditions of release would likely prevent defendant's intimidation of witnesses).

The sole bases for the detention order in this case are the findings that the defendants would, if released, carry on "business as usual" notwithstanding any release conditions, and that business as usual involves threats and crimes of violence. [App., *infra*, 48a, 56a-57a]. We regard § 3142(e)'s authorization of pretrial detention on this ground as repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes. As Judge Newman elaborated in *Melendez-Carrion*:

> The Government contends that section 3142(e) is to be upheld simply because preventive detention is a rational means of advancing the compelling state interest in public safety. That cannot be the test for determining the constitutionality of preventive detention. The fallacy of using such a test can be readily seen from consideration of preventive detention as applied to persons not arrested for any offense. *It cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future.* Yet such a police state approach would undoubtedly be a rational means of advancing the compelling state

interest in public safety. In a constitutional system where liberty is protected both substantively and procedurally by the limitations of the Due Process Clause, a total deprivation of liberty cannot validly be accomplished [on the sole ground that] doing so is a rational means of regulating to promote even a substantial government interest.

Incarcerating dangerous persons not accused of any crime would exceed due process limits not simply for lack of procedural protections. Even if a statute provided that a person could be incarcerated for dangerousness only after a jury was persuaded that his dangerousness had been established beyond a reasonable doubt at a trial surrounded with all of the procedural guarantees applicable to determinations of guilt, the statute could not be upheld, no matter how brief the period of detention. It would be constitutionally infirm, not for lack of procedural due process, but because *the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause.* This means of promoting public safety would be beyond the constitutional pale. The system of criminal justice contemplated by the Due Process Clause—indeed, by all of the criminal justice guarantees of the Bill of Rights —is a system of announcing in statutes of adequate clarity what conduct is prohibited and then invoking the penalties of the law against those who have committed crimes. *The liberty protected under that system is premised on the accountability of free men and women for what they have done, not for what they may do. The*

> *Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes.*
>
> . . . As a matter of probabilities, a person lawfully arrested may pose a greater danger than someone not arrested but only suspected of dangerousness, but is very likely less of a risk to the community than many who have been convicted, sentenced, and released from confinement after expiration of their sentences. Just as the Due Process Clause would prohibit incarcerating a person not even accused of a crime in order to prevent his future crimes, it would equally bar preventive detention of a person who has been convicted of past crimes and has served his sentence. The Clause must accord similar protection to a person not convicted but only accused of a crime. Moreover, if the arrest is thought to reflect that the person is more deserving of confinement than members of the public not accused of crime, the confinement would offend the procedural component of due process by dispensing with the procedural guarantees of the Fifth and Sixth Amendments that must be observed before past conduct may justify incarceration on grounds of dangerousness.

Slip op. at 3054-56 (Newman, *J.*) (emphasis added; footnote omitted).

In sum, if a person is not charged with a crime, he may not, consistent with principles of due process, be incarcerated simply on the ground that he is likely

to commit a crime. The lodging of charges for alleged past crimes does not alter this concept of due process. The proper remedy for charges of past crimes, assuming they are proven, is payment of the penalty provided by law for those crimes, and we note that a person who has paid this penalty stands in a similar position, vis-a-vis the Bail Reform Act, to one who has not been charged with a crime. Notwithstanding the rehabilitative aspirations of criminal sentencing, however, it must be recognized that there is a substantial amount of recidivism by those who have served their sentences. Yet, once a person has paid the penalty for crimes of which he has been found guilty, he may not be further incarcerated to protect the public. Thus, even the probability that a convicted criminal will again engage in crime does not sanction his incarceration simply in anticipation of such future crimes. His incarceration as a regulatory measure would be barred, not by the Double Jeopardy Clause, which does not apply to nonpunitive measures, *see Helvering v. Mitchell*, 303 U.S. 391, 398-99 (1938), but by the substantive component of the Due Process Clause.

To uphold § 3142(e)'s provision for pretrial detention on the ground that defendants charged with violent criminal activities will continue "business as usual" would, therefore, create the anomaly that a person who has been charged with crimes but not yet convicted may be incarcerated on the ground that he will commit crimes in the future, whereas persons who have been neither charged with nor convicted of crimes, or have served their sentence of conviction on those charges, may not be incarcerated on the basis of such a prediction.

We reject the government's contention that the fact of arrest, even for serious crimes, justifies detention

of the defendants as a regulatory measure simply because they are likely to continue their criminal activities. As stated in Judge Newman's opinion in *Melendez-Carrion*,

> [t]here can be no doubt that an arrest permits some regulatory curtailment of liberty. Even before probable cause has been found by a neutral magistrate, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975). In addition, a seizure "reasonable" under the Fourth Amendment permits detention until a determination of probable cause by a judicial officer "promptly after arrest." *Id.* at 125. Furthermore, the Constitution's scheme for a system of criminal justice specifies that arrest is to be followed by trial and plainly implies that reasonable steps may be taken to ensure that the trial will take place. Procedures may therefore be used both to secure the defendant's presence at trial and to prevent the defendant from aborting the trial by intimidating witnesses or physically harming them. . . . Pretrial detention to avoid undue risks of flight or jeopardy to the trial process [is] not prohibited by a constitutional scheme that relies on the trial process to determine guilt and enforce the criminal law.
>
> Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for holding a trial on the charges for which a defendant has been arrested. It is simply a means of providing protection against

> the risk that society's laws will be broken. Even if the highest value is accorded to that objective, it is one that may not be achieved under our constitutional system by incarcerating those thought likely to commit crimes in the future. Detention of a person lawfully arrested for past criminal conduct is unconstitutional not because preventing crime is less important than preventing a defendant's flight, but because this means of preventing crime conflicts with fundamental principles of our constitutional system of criminal justice, while detention to prevent flight serves the principles of that system by guaranteeing that the defendant will stand trial and, if convicted, face punishment.
>
> Permitting an arrested person thought to be dangerous to remain at liberty unquestionably incurs a risk. The prediction of dangerous conduct, however difficult to make and however unreliable, will undoubtedly be correct in some instances. But all guarantees of liberty entail risks, and under our Constitution those guarantees may not be abolished [on the sole ground that] government prefers that a risk not be taken.

Slip op. at 3056-59 (Newman, *J.*) (footnotes omitted). Even the risk of some serious crime, such as destruction of an airliner, as adverted to in Chief Judge Feinberg's dissenting opinion, *post*, must, under our Constitution, be guarded against by surveillance of the suspect and prompt trial on any pending charges, and not by incarceration simply because untested evidence indicates probable cause to believe he has committed one crime and is a risk to commit another one. Surveillance would doubtless be the government's response if confidential information, not

disclosable to obtain an indictment, alerted the government to such a risk by a person not charged with a crime. It should be no less effective in cases where an indictment has been returned, even assuming, which is unlikely, that a person posing such a risk would not be detained despite a well-grounded fear that he would flee.

We do not believe that *Gerstein v. Pugh*, 420 U.S. 103 (1975), upholds pretrial detention to guard against the commission of future crimes. The detention there allowed, upon a policeman's assessment of probable cause, was for the purpose of taking "the administrative steps incident to arrest." *Id.* at 114. The Court's statement that the defendant will not escape "or commit future crimes" during that brief period of detention was not said to provide a reason for continuing the detention; rather it was said to show that there was no reason for dispensing with the requirement that the police submit their evidence of probable cause to a neutral magistrate. *Id.* It would be somewhat ironic if a decision rendered to assure a suspect the protection of a neutral magistrate's determination of probable cause after "a brief period of detention to take the administrative steps incident to arrest" became the basis for extending that detention for weeks and months after the probable cause determination has been made.

Nor do we believe that the Supreme Court's decision in *Schall v. Martin*, 467 U.S. 253 (1984), upholding brief preventive detention of juveniles, disposes of the due process objection to preventive detention of adults. Though the governmental interest in protecting the public is obviously of a high order whether the danger is posed by juveniles or adults, the Court in *Schall* was at pains to point out that juveniles, who "unlike adults, are always in some

form of custody," *id.* at 265, have an interest in liberty less substantial than that of adults, an interest that "may, in appropriate circumstances, be subordinated to the State's '*parens patriae* interest in preserving and promoting the welfare of the child.'" *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

We have considered the opinions of other appellate courts that have upheld the constitutionality of pretrial detention on the ground of dangerousness and we disagree with them for the reasons stated by Judge Newman in *Melendez-Carrion*. *See* slip op. at 3060-61 (Newman, *J.*). Nor do we believe that the decision of the Supreme Court in *Korematsu v. United States*, 323 U.S. 214 (1944), authorizes the abandonment of the fundamental principle that detention simply to deter the commission of crime can properly occur only after conviction.

We emphasize again that there has been no finding in the present case that defendants pose a danger to witnesses or to the judicial process. The finding is that they will, if released, conduct business as usual. For the reasons above, we conclude that to the extent that § 3142(e) of the Bail Reform Act authorizes detention on this ground, it is unconstitutional.

CONCLUSION

The orders appealed from are vacated, and the matter is remanded to the district court for the setting of conditions of bail. All members of the panel are in agreement that the mandate is hereby stayed until the mandate of this Court is issued in *United States v. Melendez-Carrion*.

FEINBERG, Chief Judge, dissenting:

In this case, we confront the question whether the government may detain a dangerous defendant before trial in order to protect society. The majority believes that the Due Process Clause of the Fifth Amendment prevents the government from detaining such a defendant for that reason for even a brief period of time—presumably even for a day. As will be seen below, I disagree. I believe that pretrial detention for dangerousness does not violate the Due Process Clause when there is clear and convincing proof that a person already under indictment for a serious crime would commit another crime if released, if the detention has not continued so long as to constitute punishment. I would affirm the judgment of the district court, and I respectfully dissent from that portion of the majority opinion that holds the Bail Reform Act unconstitutional.

I. Is the Bail Reform Act Facially Consistent With Substantive Due Process?

The Bail Reform Act of 1984, 18 U.S.C. § 3141 et seq., permits the government to move before trial for the detention of a defendant indicted for the serious crimes with which appellants are charged, on the grounds that the defendant poses a threat to the safety of the community. 18 U.S.C. § 3142(f). Following a hearing, the judicial officer must order the detention if the officer finds that no conditions of release short of confinement will avert this threat. 18 U.S.C. § 3142(e).

We recently considered this aspect of the Bail Reform Act in United States v. Melendez-Carrion, No. 85-1431, slip op. 3023 (2d Cir. May 2, 1986). As both Judge Newman's opinion and my concurring

opinion in that case point out, slip op. at 3048-49, 3066-67, this statutory scheme has serious constitutional implications. Mentally competent adults not convicted of crime obviously have a substantial liberty interest in remaining free of confinement. Pretrial detention for dangerousness curtails that interest in an untraditional manner. But the novelty of the statute does not determine its lawfulness on its face. Rather, the relevant question is whether detention for a brief period to prevent future crimes while on release comports with the fundamental fairness demanded by the substantive component of the Due Process Clause.

Congress enacted the preventive detention provisions of the Bail Reform Act out of a deep concern about "the growing problem of crimes committed by persons on release." S. Rep. No. 225, 98th Cong., 2d Sess. 6 (1983), reprinted in 1984 U.S. Code Cong. & Ad. News at 3188-89; see United States v. Rodriguez, No. 85-1323, slip op. 4173, 4178-80 (2d Cir. June 19, 1986). Congress concluded that, at least as to "a small but identifiable group of particularly dangerous defendants," the pressing need to protect the community called for confinement before trial. Senate Report, supra, at 6-7. In Bell v. Wolfish, 441 U.S. 520, 534 n.15 (1979), the Supreme Court reserved the question whether such an objective could constitutionally justify pretrial detention. In Schall v. Martin, 467 U.S. 253 (1984), the Court settled the issue with respect to juvenile detainees. The Court rejected a due process challenge to New York's scheme of detaining for a period generally not exceeding 17 days juveniles charged with crime in order to prevent them from committing crimes while on release. The Court held that the system was compatible with substantive due process because detention based

on dangerousness served a "legitimate and compelling" goal and did not amount to "punishment." Id. at 264-75.

It is true that *Schall* concerned detention of juveniles, whose liberty interest in freedom from confinement while charges are pending against them may be inferior to that of adults in a similar position. Id. at 265. However, the societal interest identified as "compelling" by the Court only two years ago in *Schall* does not vary in strength with the age of the person to be detained. If anything, the need to shield the community from the hazards of pretrial crimes committed by adults is more compelling, since adults may have superior access to the means of committing more serious and far-reaching offenses. Accordingly, the government has advanced a legitimate and compelling reason for pretrial confinement of adults accused of crime. In light of this reason it is not surprising that other circuit courts that have considered the issue have held this aspect of the Bail Reform Act constitutional on its face. United States v. Portes, 786 F.2d 758 (7th Cir. 1986); United States v. Accetturo, 783 F.2d 382 (3d Cir. 1986); see also United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981) (en banc) upholding preventive detention under District of Columbia bail statute), cert. denied, 455 U.S. 1022 (1982).

This does not, however, end the due process inquiry. Since the Bail Reform Act curtails a defendant's precious interest in liberty, the Due Process Clause requires heightened scrutiny of the statutory means used to affect such curtailment. Under 18 U.S.C. § 3142(e), the judicial officer may order a person confined for dangerousness only after a finding that no conditions of release will assure the safety of the community. Under the statute, detention is

meant to be a sparingly dispensed remedy of last resort, used only when needed to protect society in cases where there is proof that less drastic measures would fail. Nor do appellants make any persuasive claim that the statutory procedures required as prerequisites to a finding of dangerousness are unfair or provide insufficient "protection against erroneous and unnecessary deprivations of liberty." Schall v. Martin, supra, 467 U.S. at 274.

Due process also dictates that the government not pursue its goals through "conduct that shocks the conscience." Rochin v. California, 342 U.S. 165, 172 (1952). It is not necessary to be enthusiastic about comparatively brief pretrial detention of accused persons on the basis of predicted future crimes to acknowledge that the practice does not violate that norm. It may be that such predictions are less than scientific, and that it is difficult to assess whether the verifiable gains in reducing crime justify the curtailment of liberty that results. But that assessment is for the legislature, not for us, to make, so long as there is no constitutional violation. There is nothing inherently shocking to the conscience in using a prediction of future criminality to justify confinement. When a person has been convicted of crime, judges legitimately rely on such predictions in setting the length of a prison sentence. Identical considerations shape the decision whether to grant bail to a convicted person pending appeal. Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962); United States v. Anderson, 670 F.2d 328 (D.C. Cir. 1982) (per curiam); United States v. Provenzano, 605 F.2d 85 (2d Cir. 1979). In both situations, a judge's informed assessment of a person's dangerousness may increase the length of time that the person is incarcerated. The law also acknowledges that a

person arrested for crime may be summarily detained for a short while before coming before a magistrate not only to prevent flight or danger to the judicial process, but also to bar commission of future crimes. Cf. Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (once suspect is in custody "there no longer is any danger that suspect will escape or commit further crimes" while police submit evidence to magistrate). If the police may detain an arrestee for a short time to prevent danger to the community pending a finding of probable cause, Congress may direct judges to do the same after an indictment and pending trial.

There is no doubt, as the majority points out, that putting someone in jail simply because he is thought to be dangerous is not part of our tradition of liberty. But the issue is not as stark or as simple as that. Under the Bail Reform Act, a number of limitations come into play before a person can be confined. First, the person must be charged with a crime, and not just any crime, but a serious crime as specified in the statute. Second, the government must persuade a judicial officer by clear and convincing evidence that the defendant is a danger to the community. Third, the government must also persuade the judicial officer by the same standard of proof that no condition of release will deter the defendant from committing a crime while at liberty. Fourth, the detention is meant to be of limited duration—until it can be determined whether the defendant is guilty of the crime charged. So the constitutional issue before us is not simply whether an individual can be confined because he is dangerous. It is whether a defendant already indicted for a serious crime can be denied bail in the pretrial period because there is clear and convincing evidence that the defendant will otherwise commit another crime while on release. So stated, the pro-

position still raises grave constitutional issues but the answer to them is not easy. For example, if a member of a terrorist organization is indicted for blowing up an airliner for political reasons and there is clear and persuasive evidence that the defendant will do so again if not confined, it is not self-evident to me that society must nevertheless immediately release him on bail until he is tried.

The majority sees an "anomaly" in holding the Bail Reform Act constitutional because

> a person who has been charged with crimes of violence but not yet convicted may be incarcerated on the ground that he will commit crimes of violence in the future, whereas persons who have been neither charged with nor convicted of violent crimes, or have served their sentence of conviction on those charges, may not be incarcerated on the basis of such a prediction.

I see no anomaly. The Bail Reform Act applies only to persons indicted for serious offenses, not to unaccused citizens plucked from the population at large. Indictment basically alters the due process inquiry by establishing probable cause to believe that the accused has committed specific acts constituting a serious crime. That legal finding gives the government a concrete basis, not available as to persons not accused, for predicting that the person will commit another crime before trial.[1] In other contexts, probable cause is also sufficient to permit significant re-

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[1] Also inapposite is the analogy to those who have served sentences for past offenses but have not been again indicted. Double jeopardy considerations apply to them. In addition, a principal rationale for sending convicted offenders to prison is that their sentence will rehabilitate them and deter them from future misconduct. Neither consideration applies to those not yet convicted of a crime.

straints on liberty. See Gerstein v. Pugh, supra, 420 U.S. at 118-20 (detention of arrested person pending further proceedings); Morrissey v. Brewer, 408 U.S. 471, 485-87 (1972) (detention of parolee pending final decision whether to revoke parole). Moreover, as noted above, the Bail Reform Act has a built-in limit on the length of the period for which an accused person may be detained. The end of that period coincides with the disposition of the underlying criminal charge against the defendant, whether by plea or by trial. While undue pretrial delay may further affect the due process equation, see Part II below, detention under the Bail Reform Act is meant to be limited to preserving the status quo, as far as the community is concerned, pending the resolution of specific legal charges.

For these reasons, I conclude that detaining indicted defendants under the Bail Reform Act for a limited time on the basis of clear and convincing evidence that nothing short of confinement will prevent them from violating the law while on release does not violate any norm of decency implicit in the concept of ordered liberty, and does not violate the Due Process Clause.

II. Does the Statute as Applied Comport with Due Process?

Up to this point, I have considered whether the Bail Reform Act is unconstitutional on its face. The conclusion that it is not does not determine whether the statute as applied comports with due process. The government's powers of preventive detention in a given case are not limitless. Every other appellate court that has examined the lawfulness of this practice under the Bail Reform Act has indicated that

pretrial detention to prevent future crimes may be invalid if unduly prolonged. Portes, supra, 786 F.2d at 768 & n.14; Accetturo, supra, 783 F.2d at 388; see also United States v. Theron, 782 F.2d 1510, 1516 (10th Cir. 1986); cf. United States v. Edwards, supra, 430 A.2d at 1333 (stressing 60-day time limit of D.C. preventive detention scheme determined to be constitutional). This reflects widespread agreement that the passage of time can tip the scales of the balance mandated by due process.

To put the proposition another way, even legitimate and compelling objectives cannot justify detaining a person indefinitely before trial. At some point in time, the harsh burdens of extended confinement will exceed the bounds of due process. As I stated in my concurring opinion in *Melendez-Carrion*, slip op. at 3068-73, lengthy pretrial incarceration can run afoul of the rule that the government may not punish a person not convicted of crime. Bell v. Wolfish, 441 U.S. 520, 535-36 (1979). Whether a measure is punitive in nature depends both on whether the action is imposed for the purpose of punishment and whether it is excessive in relation to the legitimate, nonpunitive aims assigned to it. Schall, supra, 467 U.S. at 269; Bell v. Wolfish, supra, 441 U.S. at 538-39.

In *Melendez-Carrion*, Judge Newman and I were willing to assume that Congress did not intend preventive detention under the Bail Reform Act to be a punitive measure. However, the second branch of the due process inquiry demands that confinement before trial not be excessive in relation to the statute's goals. Accordingly, undue prolongation of detention before trial can transform what is initially a valid regulatory measure into punishment pro-

hibited by the Due Process Clause. That is so because the traditional test for distinguishing regulatory from penal measures set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963), and reaffirmed in Bell v. Wolfish, supra, looks to whether a measure "involves an affirmative disability or restraint" and whether "it has historically been regarded as a punishment." Detention before trial undoubtedly imposes a major disability and restraint on the defendant. As I explained in *Melendez-Carrion*, detention for a long period of time founded on a person's danger to the community is also so harsh that it comes to resemble a traditional prison sentence. Since none of the traditionally "regulatory" reasons for jailing a person without trial, such as the defendant's propensity to flee or to tamper with witnesses, justify confinement in such a case, such lengthy detention would historically be seen as a punishment. Accordingly, unduly extended incarceration for general dangerousness of persons never convicted of any crime can cross the line separating a valid regulatory measure from punishment imposed in violation of the Due Process Clause. Melendez-Carrion, supra, slip op. at 3071-73.

In *Melendez-Carrion*, I took the position that the length of preventive detention requires assessment on a case-by-case basis, since due process does not necessarily set a bright line limit for length of pretrial confinement. Here, Salerno and Cafaro have been detained for dangerousness for a little over three months. Arguably, time alone should not always determine whether a given instance of detention for dangerousness has become punitive. Though length of time may be the best measure of the impact of incarceration on a person accused of crime, perhaps

due process judgments should take into account the reasons for pretrial delay in unusual circumstances. Relevant factors might include the complexity of pretrial preparations for the underlying case, and whether the defendant or the government has added needlessly to that complexity or has egregiously delayed the proceedings. See Accetturo, supra, 783 F.2d at 388. I cannot conclude on this record that the restriction on appellants' liberty has degenerated into punishment. Were we to affirm, I would not foreclose appellants from renewing their constitutional claims at a later date.[2] But at this point, there is no constitutional basis on which to set aside Salerno's and Cafaro's detention. We should affirm. I respectfully dissent.

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[2] Pretrial detention under any circumstances is an extraordinary remedy with serious due process implications. If the government seeks the benefit of that remedy it must exert itself to accelerate the date for a trial. Quite often, reliance on the usual processes of trial administration will not be enough. If this is so, the government must take whatever special steps are needed to move the trial date forward. In complex multi-defendant cases, that may require that the government seek a severance. In cases involving many hours of taped intercepted material, the government may have to arrange for swift and reliable transcription, by extraordinary means if necessary, before moving for detention or immediately after obtaining it. Should the government be unwilling or unable to shoulder the cost of these procedures, pretrial detention may not be available.

The Speedy Trial Act, 18 U.S.C. § 3164, does mandate that cases involving detained persons be given priority. On June 4, the trial judge apparently set a date shortly after October 1, 1986 for submission of pretrial motions in this case. Such a leisurely pace in a criminal case involving pretrial detention is difficult to justify.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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86 Cr. 245 (MJL)

UNITED STATES OF AMERICA

—against—

ANTHONY SALERNO, a/k/a "Fat Tony,"
VINCENT CAFARO, a/k/a "Fish,"
VINCENT DiNAPOLI, a/k/a "Vinnie,"
LOUIS DiNAPOLI, a/k/a "Louie,"
GIUSEPPE SABATO, a/k/a "Pepe,"
CARMINE DELLA CAVA, a/k/a "Carmine,"
THOMAS CAFARO, a/k/a "Tommy,"
JOHN TRONOLONE, a/k/a "Peanuts,"
MILTON ROCKMAN, a/k/a "Maishe,"
NICHOLAS AULETTA, a/k/a "Nick,"
EDWARD J. HALLORAN, a/k/a "Biff,"
ALVIN O. CHATTIN, a/k/a "Al,"
RICHARD COSTA, a/k/a "Richie,"
ALPHONSE MOSCA, a/k/a "Funzi," and
NEIL MIGLIORE, a/k/a "Neil," DEFENDANTS

[Apr. 2, 1986]

OPINION AND ORDER

WALKER, DISTRICT JUDGE:

The government has moved pursuant to the Bail Reform Act of 1984, 18 U.S.C. section 3142(f)(1)(A), "in a case . . . that involves . . . a crime of

violence" for pretrial detention of defendants Anthony Salerno and Vincent Cafaro, who, with thirteen other defendants, are named in indictment 86 Cr. 235 (MJL) filed on March 20, 1986, and unsealed on March 21, 1986. The government concedes that neither defendant poses a risk of flight but urges strenuously that no condition of bail or combination of conditions will assure the safety of the community or of any person and that therefore pretrial detention is mandated under 18 U.S.C. section 3142(e). For the reasons set forth below, this court finds that the government has established by clear and convincing evidence that both defendants pose a present danger to the community and that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community.

On March 21, 1986, both defendants appeared for the first time before this court, sitting in Part I. Both defendants moved for a 5-day continuance as provided in 18 U.S.C. section 3142(f), and this court set the hearing for March 26, 1986. The hearing was held on March 26 and 27, 1986.[1] The information received from both sides was by way of proffer as permitted by *United States v. Martir*, No. 86-1005, slip op. (2d Cir. Feb. 3, 1986).

The 88-page indictment charges that the fifteen defendants were leaders, members, and associates of the "Genovese Organized Crime Family of La Cosa Nostra (The Genovese Family)," that the Genovese

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[1] On March 27, 1986, the case was assigned by lot to Judge Lowe pursuant to Rule 8 of the Local Rules for the Division of Business Among District Judges. With Judge Lowe's consent, this court completed the hearing and is entering the within findings and conclusions.

Family was an "enterprise" as defined in 18 U.S.C. section 1961(4), and that the purposes of the enterprise included the unlawful infiltration in New York City of legitimate businesses in the concrete construction, food manufacturing, and food distribution industries, exercise of control over unions in these and other industries, operation of illegal gambling businesses, loansharking, murder and conspiracies to murder those who would threaten the enterprise, engendering fear of the enterprise through violence and concealment of the existence of the enterprise from law enforcement authority.

The indictment charges that the means and methods of the enterprise included the maintenance of a hierarchial "organized criminal group" operating in New York and other states. The enterprise operated through "crews" made up of "members" and "associates" and led by a Captain, or "Capo." In charge of the several "crews" and their "capos" was on overall "Boss" and, at times, an "Underboss." When a "Boss" was incapacitated or imprisoned, one of the "Capos" in the Genovese Family served as "Acting Boss." The "Bosses" and "Capos" supervised and protected the criminal activities of the enterprise's members and associates. The indictment charges that Anthony Salerno is the present 'Boss" of the Genovese Family and has served in the past as its "Acting Boss" and "Consigliere" and that Vincent Cafaro is a "Capo" in the Genovese Family.

The indictment delineates the roles of all defendants in the Genovese Family hierarchy and in its criminal racketeering activities of bid-rigging in the concrete construction industry, extortion, loansharking, labor racketeering, gambling, and the use of violence. The defendants are charged both with con-

spiracy to participate in the above racketeering enterprise and actual participation in the enterprise in violation of 18 U.S.C. section 1962. The indictment further charges sixteen counts of mail fraud, under 18 U.S.C. sections 1341 and 1342, in connection with the bid-rigging scheme in the concrete construction industry whereby the enterprise rigged subcontract bids valued variously in the range of $3,000,000 to $13,000,000 in major building projects in New York City. The indictment further alleges an 18 U.S.C. section 1343 wire fraud count relating to the election and control of Roy L. Williams as President of the Teamsters International; a conspiracy to extort payments from a food distributor, Marathon enterprises, seven extortion counts relating to Marathon's distribution arrangements with legitimate retailers, and a conspiracy to extort payments from one Anthony Giordano, all in violation of 18 U.S.C. sections 1951 and 1952; one count of illegal numbers in violation of 18 U.S.C. section 1955 and one count of illegal bookmaking, both in violation of 18 U.S.C. section 1955 [*sic*].

A principal thrust of the indictment is that the power and effectiveness of the Genovese Family to carry out its criminal activities depends on its ability and willingness to use violence and its reputation for violence. Violence is alleged as a method and means of the racketeering enterprise and the specific racketeering acts alleged include not only the foregoing extortion counts, but two murder conspiracies as well.

FACTS

The government's proffer in support of detention consisted of the prospective testimony of two witnesses who had previously testified in organized

crime trials, James Fratianno and Angelo Lonardo, evidence from a search conducted at the apartment at 115th Street and First Avenue, the full-time residence of Cafaro and the in-town residence of Salerno, as well as excerpts from electronic surveillance in two locations in Manhattan from which Genovese Family business was conducted—the Palma Boys Social Club and the Social Club at 2244 First Avenue —and one location in a trailer in Edgewood, New Jersey.[2] The proffers related primarily to conspiracies to murder, and labor loansharking, and gambling violence.

Conspiracy to Murder

The government proffered that Fratianno would testify, as he had in a previous trial, that in 1976 he attended a meeting in a back room of a store in which members of Genovese Family including Salerno were present. Those assembled decided to murder John Spencer Ullo, a person engaged in loansharking for the Genovese Family. There was a vote taken and, Fratianno testified that "Gigante said 'I vote to hit,'

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[2] The government relied upon the Edgewater surveillance in its proffer against Salerno in connection with a conspiracy to murder and extort Andrew Giordano in 1984. Salerno argued that 18 U.S.C. section 2518(9) was violated since he was not given ten-days notice of its use at the hearing. Whether that ten-day notice requirement applies at a pretrial detention hearing is open to question given the five day limitation on 18 U.S.C. section 3142(f) continuances. The court has received this proffer on the government's representation that Salerno lacks standing to move to suppress the Edgewater surveillance and thus is not prejudiced by the government's non-compliance with the ten day requirement. The validity of the two Manhattan surveillances has been fully litigated in other proceedings and is not objected to by either Salerno or Cafaro.

Tieri said 'Hit,' Salerno said 'Hit,' and it went around the table in a unanimous fashion." The "contract" was not carried out when Ullo got wind of the plan in California and was himself able to kill the hitman. The government proffered that it would corroborate Ullo's role in the Genovese Family, that Ullo feared certain individuals in the family and took steps to protect himself once he learned that the individual in California was out to kill him. T. 13-15. The trial at which Fratianno testified resulted in the conviction of Tieri.

The government proffered that according to another prospective witness, Angelo Lonardo, Salerno and the Genovese Family issued a "contract" in 1980 to kill John Simone who was also known as Johnny Keyes. The "contract" arose out of the murder of Angelo Bruno, the former head of the LCN family in Philadelphia. Salerno contacted one John Tronolone and asked him to pass out the word that there was a "contract" on the life of Johnny Keyes and others. While in Florida, Tronolone told Lonardo that if Keyes shows up then the "contract" should be fulfilled. Lonardo at the time was the head of the Cleveland LCN family that reported to the Genovese Family in New York and Tronolone was its "consigliere" who, in effect reported to two bosses, Salerno and Lonardo. Johnny "Keyes" Simone asked Tronolone for his assistance in settling the matter. However, Tronolone lied to Keyes in saying that he would try to settle his dispute with Salerno. Tronolone told Lonardo that instead he would go to New York to see Salerno to set Keyes up. After speaking to Salerno, Tronolone told Lonardo that he would now tell Keyes to travel to New York and that everything was okay. Keyes went to New York to see Salerno

and was killed with three bullets in the head. Later Tronolone explained to Lonardo that he had set Keyes up. T. 16-18.

Lonardo will also testify that two individuals, John Nardi and Danny Green in the Cleveland LCN were killed in 1977. Prior to the murders, Lonardo and Jack Licavoli of the Cleveland Family came to New York to explain the problem to Salerno and Philip Lombardo, alias Benny Squint, who was at that time the "Boss" of the Genovese Family. Licavoli and Lonardo asked Salerno and Lombardo to request Castellano to carry out the "contract" on Green and Nardi if they appeared in New York to meet with him. Both Salerno and Lombardo approved the "contract" and agreed to do so. Before the "contract" could be fulfilled in New York, Nardi and Green were killed elsewhere in car bombing incidents. T. 18-24.

In another murder conspiracy, one Milton Parness requested permission of Salerno to kill Anthony Giordano, a debtor to Parness' extortion operations. Parness is overheard on surveillance in January 1985 telling an associate that Salerno responded to Parness' inquiry "Do we kill him and get it over with?" by replying "If you want to kill him, we will kill him." T. 24-29.

In addition to witness testimony indicating that Salerno is presently the Genovese Family "Boss," the government proffered an intercept of Salerno in 1984 on an occasion when Salerno describes how he would deal with someone who owes money to him. Salerno says that if the person asks him who he is, he will say: "What am I? I'm the f-----g boss." T. 30.

In an intercept in February, 1984, Vincent Cafaro, his son Thomas Cafaro, and a third individual are overheard discussing an Uzi machine gun in their

possession at 2244 First Avenue. Cafaro says he knows about these sorts of weapons because "I got the same thing upstairs." T. 31-32. In February, 1985, a search executed in the 115th Street apartment shared by Salerno and Cafaro yielded a .25 caliber automatic weapon together with an empty clip and seven live rounds of ammunition. Cafaro admitted at the time that the weapon was his. T. 33.

Labor Violence

In early 1984, a conversation between Salerno, Christopher Fennari and Vincent Cafaro was intercepted relating to who was to take control of the local carpenters' union. Salerno explains to Cafaro a prior incident with the carpenters: "[W]e sent a couple of kids after the carpenters. This is a good two years ago. They gave them a beating." T. 34.

In another conversation in early 1984, Cafaro is told by another person that his son was involved in a bar fight and later told a woman and a man in the bar, if asked about the fight, to "mind their own business." Afterwards, the person received a phone call from somebody claiming to know "Fish," Cafaro's alias, and wanting to know why his son spoke to his daughter that way. Upset at this unauthorized use of his name, Cafaro tells the man to tell the phone caller: "Just say: 'Fish' said if you ever mention this name again or this guy's name again, he is going to come over here personally and break your f------g legs." T. 34-36.

Loansharking and Extortion Violence

In January 1984, Cafaro's son Thomas explains to his father that an associate, "Crazy Tom", was asking another person for $2,500 owed to him. When

Thomas Cafaro states that Crazy Tom started yelling at the kid, Vincent Cafaro interjected "Why didn't he give him a f-----g beating?" Later in the conversation, Cafaro, referring to the debt, says that to collect the money he should tell him "I will break your f-----g ass. Give me my money. If you ain't got my money in a week, I am going to break your f-----g ass, that's all." He later tells his son that he better tell Crazy Tom that this fellow better not come by the club because he would then have to get Crazy Tom to "break the f-----g kid's head." T. 37-39.

In another conversation in early 1984, Vincent Cafaro speaks to an associate about a debt owed to him by one, Ralph. Cafaro states "I was going to give him a f-----g beating like when Richie was here. If I had him, I'm going to break his mother f-----g legs." Later on in a conversation, Cafaro relates "I had an incident with him; going down there, threaten the f-----g, knock his f-----g brains in. We got to prove it, I threatened to get the money." His associate replies "You had to get $500 a week. It was his job, he gives you the first couple of payments. After that, what happens? He cries." T. 40.

In a conversation in early 1984 between Cafaro and one "Pete," Cafaro states that he told Frankie Salerno to "get a hold of this kid [that owes him money] and bring him to me. He wants to be a wise guy. He told the guy he wants to bet from a thousand to $2500 and he thinks he ain't going to pay? I'll knock his f-----g brains in." Later on, Pete tells Cafaro: "I put up with him Fish. I came and I gave him a beating." Cafaro replies: "Good he deserves it." Pete says: "I gave him a beating. He was full of blood. His f-----g face was all marked. Every f-----g shot I gave him, he had a lump like this, cuts here,

cuts there; ah, I, he ain't got no face." Cafaro replies: "Yeah, you banged him up good, f--k him." T. 41.

In a conversation in March 1984, Salerno tells two others about an individual to whom Salerno had lent $150,000. When Salerno learns that the money is not being used for its intended purpose, he tells his listeners what he told the borrower "I told him, I says, what did I give you that money for? I said, I didn't give you the $150,000 to straighten everybody out, you c--------r. If you don't bring me that money Saturday . . . I know he could give me the money now if he has got it, he has to get it out of all these big shots. . . . I says I will kill you right in f----g, you c--------r. And I walked out." T. 42.

Gambling Violence

The government proffered numerous conversations relating to the problems that Cafaro and Salerno had with regard to outside competitors of the Genovese family numbers business and, in particular, violation of the "two-block rule" whereby a competitor was not permitted within two blocks of a Genovese Family numbers store. In a conversation in early 1984, after Cafaro is told about a new store violating the two-block rule, he says: "Alright give me the address and I'll send these kids. I'll send these kids right up there. They will take the joint and put it all in the street. They don't want the f--ks. Knock the f-----g joints right out. These kids here, these Cuban kids I got around me, they are good kids. I used them against the Jews the way I used Blood [an enforcer for the Genovese gambling operation] against the niggers. You understand when there is a beef with

a nigger, don't worry, Frankie, I'll handle it." T. 43, 44.

In a conversation in January 1984, Cafaro tells one "Artie," who appears to have a role in the Genovese gambling operations, of a dispute with the owner of a new competing gambling store in violation of the two-block rule, Cafaro said: "You are not opening that store." He said: "Well, I am open already. I am going to stay there." "Good, I says, fine." Cafaro goes on: "Now, I says, tomorrow I'm giving you fair warning. I am coming there personally, and if this joint is open, f-----g joint is going to go in the street and there's going to be a blood bath in there with your f-----g body. I tried to be nice to you, I say, but I could see you want to go the other way. Fine, I got up and I said, 'come on, get out.' And he says: 'Wait a minute, can I talk?' 'There is nothing to talk about. You spoke, and you said what you had to say and that's it.' " T. 44-45.

In another conversation in June 1984, Vincent Cafaro tells one "Freddie," also involved in Genovese gambling operation [*sic*] about a numbers store Cafaro wants broken up. And he tells Freddie "Get hold of Blood, and tell Blood to send his guys into the store." "Break it up and put locks on the door, and whoever is in there, knock their f-----g brains out." Cafaro later says: "That's what those guys are paid for." T. 45.

In another conversation in March 1984, Cafaro tells "Artie" about another store in violation of the two-block rule. He gives Artie directions to get there and tells him "I want you to go there and frighten people." T. 45 .

In a conversation in April 1984, Cafaro reports to Salerno about one "Bobby" controlled by "Buddy"

who has opened up a numbers store across the street from one of theirs. Cafaro tells Salerno that they said that "They don't believe that the store across the street belongs to us, that I should go see Buddy." Cafaro says: "I'm going to tell Buddy: Buddy, this f-----g kid Bobby, if you can't control him, I will knock his f-----g brains in." T. 46-47.

In December 1984, Cafaro and Salerno discuss a problem with another numbers store, operated by Spanish Raymond Marquez, that is paying out too much money on the winning numbers. Cafaro and Salerno discuss the fact that they are "friendly" with Spanish Raymond, but still have to deal with the competitive threat. Cafaro tells an associate, who asks what should be done, "Do what you want." Salerno says: "You know, tell him not to mention our names because we are friendly with that guy." Cafaro asks: "With whom?" Salerno says: "With Raymond." Later, Salerno says: "Well, let them do what they want." Cafaro reports: "I told him, do what you want with the stores, but as far as him, leave him alone." Later, Cafaro reports to Salerno: "So, if you hear that he wants to see you about the stores, that they broke them up or whatever they did, I told them, Go ahead do what youse [*sic*] want, and I said, but leave him alone, I don't want him to get . . . ." Later, Cafaro says: "We ain't going to f--k around with him, we just going to break up any store he puts 9 to 1, we are going to break him up." Later, Salerno asks whether Blood is going to go along with them. Salerno later says: "This has been going on for 50 to 60 years, always trouble with them. They loose [*sic*] $2 and then they start scheming." T. 47-49.

Salerno proffered more than a dozen witnesses who would testify, in substance, that while they had no

knowledge of any of the allegations in the indictment or of facts to support them, that they had known Salerno for many years, considered him a friend, and did not consider him to be any danger to the community.

Salerno also proffered that Fratianno and Lonardo were subject to impeachment on the basis of their criminal pasts and their favorable "deals" with the government.

Salerno also proffered a letter from his doctor since 1977, John H. Laragh, M.D. of the New York-Cornell Medical Center, setting forth the medical history of Salerno, age 74, to include "a long standing history of high blood pressure complicated by congestive heart failure." This condition, first discerned in 1961, has resulted in "serious vascular damage" which despite a "strict medical regimen" has progressed." Dr. Laragh's [*sic*] stated: "Since he has been under our care, we have simplified his medical regimen and accomplished much better blood pressure control." In 1981 Salerno suffered a stroke from which "he has recovered" with some limited residual disability. Dr. Laragh offered no opinion on the impact of a period of detention on Salerno's medical condition.

Salerno proffered no evidence tending to rebut the government's evidentiary proffer relating to Salerno's violent acts and conspiracies and his position as "Boss" of the Genovese Family.

Cafaro proffered no evidentiary material. He argued that the tapes revealed at most "tough talk" and that the government had offered no proof that the violent acts discussed by Cafaro were actually carried out.

DISCUSSION

(a) *United States v. Colombo*

The facts and holding in *United States v. Colombo*, 777 F.2d 96 (2d Cir. 1985), are particularly instructive to the court here.[3] In *Colombo*, the defendant, Anthony Colombo, headed a multifaceted criminal enterprise engaged in murder, robbery, narcotics, arson, extortion, threats, assaults, illegal gambling, bribery, theft, and mail and wire fraud.

On the basis of the government's proffer, the magistrate ordered Colombo's detention. Later, after a hearing, the magistrate ordered Colombo's release on the grounds that Colombo as the head of the organization did not personally participate in any violent act and that his ability to orchestrate violent actions was only moderately attenuated by his incarceration. Chief Judge Weinstein concurred with the magistrate's conclusion that the government had failed to establish by clear and convincing evidence that detention was necessary. Finding that the monetary conditions set by the magistrate assured only Colombo's presence at trial, Chief Judge Weinstein set other conditions of release designed to protect the

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[3] In *Colombo*, the charges relating to narcotics triggered the presumption that no condition or combination of conditions would assure the safety of the community. Such a presumption shifts to the defendant the limited burden of production and not the burden of persuasion. *Id.* at 98. Colombo met his burden of production.

In *Colombo*, as in the case before the court, the government had the burden to prove by clear and convincing evidence that no condition or combination of conditions of release would assure the safety of the community. The mere fact that a limited burden was rebutted in *Colombo* but is not present here is not sufficient grounds for distinguishing these cases.

community that are strikingly similar to those proffered by counsel for Salerno in this case. In holding the order of releasing Colombo on the specified bail conditions to be "clearly erroneous," the Court of Appeals stated:

> "The particular danger that Colombo, for purposes of the bail determination, was found to pose—that of alleged supervisor and director of the "Colombo crew"—is hardly alleviated by the type of conditions established by the district court. In light of Congress' direction that "[w]here there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate," S. Rep. No. 225 at 7; 1984 U.S. Code Cong. & Ad.News at 3189, we hold that the decision to release Colombo based upon conditions which we consider to be wholly inadequate was clearly erroneous."

Id. at 100.

Colombo also held that consideration of the length of detention due to the probable delay in bringing the case to trial was inappropriate at the pretrial detention hearing since it remained a speculative matter and the Speedy Trial Act, 18 U.S.C. section 3161 *et seq.*, addressed any due process concerns on that score. *Id.* at 100-101.

(b) *Findings*

The court has received a great deal of information about Salerno's danger to the community; it is overwhelming. By "clear and convincing" proof, the government has established that Salerno is the head, or

"Boss," of an organization engaged in extortion, loansharking, illegal gambling, and murder. The government has proffered information and has stated that witnesses will testify that Salerno conspired to murder John Spencer Ullo, Johnny "Keyes" Simone, Danny Green, and John Nardi. The government has proffered information showing that Salerno could order a murder merely by voicing his assent with the single word "hit." Although some of these murder conspiracies occurred between six and ten years ago, their seriousness and the ease with which they could be ordered weigh heavily in favor of finding that Salerno is a present danger to the community. In addition, Salerno voiced a willingness to "hit" Andrew Giordano in 1984.

Murder is not the only act of violence attributable to Salerno. He is a danger to the community as the "Boss" of an organization that uses force, violence, and threats of force and violence to further its illegal operations. The government proffered substantial information that Salerno's organization uses force and threats of force to maintain its illegal loansharking and gambling operations. These acts are carried out by or ordered by the organization's captain, Cafaro. However, as head of the organization, to whom Cafaro reports, Salerno controls the use of such force.

There is ample information to conclude that Cafaro and others under Salerno's control have the means to carry out the violent acts. The .25 caliber automatic weapon and ammunition found at the apartment shared by Salerno and Cafaro and the Uzi machine gun that Cafaro admitted having in his possession are proof enough that the organization has the ability to commit violent acts. Salerno also has the present ability to order such acts. There is ample

proof that Salerno's organization engages other individuals to commit acts of violence.

Salerno offers several arguments in favor of his release. First, he argues that all the facts alleged in the indictment were known to the government in February 1985, when he was indicted in *U.S. v. Colombo*, 85 Cr. 139, the "Commission" case. He contends that the government should be precluded from moving for detention now because it failed to move for detention then.

But, simply put, not all the facts were known to the government at the time of the "Commission" indictment. Lonardo did not come forward as a government witness until August 1985, several months after the "Commission" indictment. Further, Salerno is not named in any specific murder conspiracy in the "Commission" indictment. Thus, it is far from clear that, at the time of the "Commission" indictment, the cumulative evidence against Salerno supported pretrial detention.

Salerno argues, alternatively, that if the new information were available in August, the government should have moved at that time for detention under section 3142(f) and its failure to do so should preclude this motion. While the government was permitted to seek detention of Salerno in August 1985, when the new information became available, the "first appearance" requirement of 18 U.S.C. section 3142(f) would presently bar such an application in that case at this time. *U.S. v. Resek*, 602 F. Supp. 1126 (S.D.N.Y. 1985). But no such impediment exists under this indictment where the government has moved for detention at the defendant's first appearance. With the "first appearance" requirement under section 3142 satisfied, the Act permits such detention if warranted.

As Salerno concedes, the government's failure to seek his detention earlier in the "Commission" case only effects [*sic*] the weight and credibility of the government's proffer that Salerno poses a danger to the community and does not bar the government from seeking detention under the new indictment as a matter of law. After according the government's proffer the weight it deserves, this court remains firmly convinced that Salerno poses a *present* danger to the community,

At the hearing, Salerno challenged the credibility of two named witnesses for the government, Fratianno and Lonardo. The court has carefully weighed the reliability of these witnesses and the other proffered information against the defendant in determining that he presents a danger to the community.

Although the proffered testimony of witnesses need not be corroborated, the government proffered that it would corroborate some of Fratianno's testimony about the John Spencer Ullo murder. Moreover, both Fratianno and Lonardo have given sworn testimony at other criminal trials which resulted in convictions. T. 15, 67. This court does not rely on the proffered testimony of either Fratianno or Lonardo alone, however, in making its finding. The cumulative nature of the proffered testimony of Salerno's role in murder conspiracies, the taped evidence of Salerno's willingness to kill Giordano, and the taped evidence of Salerno's role as "Boss" of the enterprise establish by clear and convincing evidence that Salerno is a danger to the community.

Salerno requested that Fratianno and Lonardo be produced for cross-examination to attack the credibility of each witness by exploring his criminal past and his agreement with the government. Salerno

made no proffer, however, that the factual account by either witness would contradict the government's proffer. Salerno did proffer that if cross-examined, both witnesses were impeachable based upon their prior bad acts and their "deals with the government." T. 101-103, 121-123.

The court declines to order the production of the witnesses and does rely in part upon the government's proffer as to the substance of their testimony if called. While the court may, in its discretion, order the production of witnesses, the defendant has no automatic right to their production.

At a pretrial detention hearing, many of the rights a defendant enjoys at a criminal trial are absent. The detention hearing is not punitive in nature; it is an involuntary civil commitment proceeding at which proof by a standard less than "beyond a reasonable doubt" is applicable. See *Addington v. Texas*, 441 U.S. 418 (1979). In *U.S. v. Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982), in upholding the constitutionality of a statute similar to the Bail Reform Act, the court stated:

> [P]retrial detention is not punitive in purpose. Our societal determination that the risk of error in a criminal trial be balanced in favor of the accused is closely tied to the punitive aspects of conviction and has no application to detention pending a trial at which the government will be required to meet the higher burden.

Id., 430 A.2d 1339.

While the defendant at a pretrial hearing may cross-examine witnesses who do testify, such cross-examination may be limited to prevent premature

discovery, protect witnesses' lives or protect ongoing investigations. *U.S. v. Acevedo-Ramos*, 755 F.2d 203, 205 (1st Cir. 1985). Moreover, the government has no obligation to proceed by way of live testimony and a court may rely upon hearsay, including investigatory descriptions of evidence, where the judicial officer reasonably concludes that those descriptions, reports and similar evidence, in the particular circumstances of the hearing, are reliable. In enacting the Bail Reform Act of 1984, Congress did not wish to alter the nature of the informal proceeding at which bail had been set prior to its passage. *United States v. Acevedo-Ramos, supra* at 206-08.

In a case, similar to this one, where the defendant requested the live production of government witnesses, the District of Columbia Court of Appeals, sitting En Banc, required the defendant to at least proffer that the testimony would tend to "negate substantial probability that the accused committed the charged offense" and held that "cross-examination for the purpose of impeaching witness credibility is an insufficient reason to compel a witness' presence." *United States v. Edwards, supra* at 1338.

The government has a substantial interest at this early stage of the case in preventing premature discovery, in protecting the emotional and physical well-being of its witnesses and in preventing impairment of on-going investigations. On the record of this case, the court finds that these interests outweigh any prejudice claimed by Salerno in not being able to directly impeach Fratianno and Lonardo. This prejudice is minimized by Salerno's proffer of impeachment material as to these witnesses, which the court takes into account in reaching its findings, as well as the substantial independent proof against Salerno.

Salerno's proffer of witnesses to testify to his lack of dangerousness to the commmunity is of marginal utility to the court. Such witnesses admittedly know nothing of the allegations in the indictment nor of the facts in support of them. Yet it is precisely those charges and the specific facts supporting those charges, proffered by the government in great detail, that support the government's contention that detention is required. Given the clandestine nature of such organized criminal activity, the fact that many people are unaware of Salerno's behavior and role in the enterprise and thus can be expected to testify as to his lack of dangerousness is neither surprising nor useful to the court in deciding this application. Moreover, the government proffered that one such witness, John Squitieri was a "day-to-day participant in the gambling operation" of the enterprise. T. 157. Squitieri's apparent willingness to lie and his own ties to the enterprise severely undermine any testimony he would give in support of Salerno.

Salerno's proffer of medical testimony is similarly unhelpful. Nowhere does Salerno claim that his vascular condition will affect his ability to run the Genovese Family enterprise if he is released. Nor is it claimed that his condition cannot be treated during detention. Indeed, the court has already directed the Warden of the Metropolitan Correctional Center to permit Salerno to receive his regular medication and to depart from its planned exercise program to permit Salerno to use an exercise bike twice a day, every day.

The proposed conditions of bail proffered by Salerno, characterized by defense counsel as "house arrest," are inadequate to control or diminish the danger posed to the community by Salerno. In fact,

the proposed conditions closely parallel those found clearly erroneous in *United States v. Colombo, supra.*

Under the proposal, Salerno would be closely monitored by the Pretrial Services Agency, restricted to his home from 8:00 p.m. to 7:00 a.m., and limited in his ability to function during the remaining hours. Upon notice, he could travel within the State of New York for legal or medical purposes. He could also attend to business outside his residence with the permission of the Agency, but he would be prohibited from visiting his residence at 115th Street. He would also surrender any valid passports, associate with co-defendants only in the presence of his attorney, and avoid the commission of crimes, including intimidation of witnesses.

As the Second Circuit made clear in *Colombo,* this examination of the intricacies of release is largely academic. The key point is that under these conditions, Salerno, like Colombo, is not prevented from doing the very thing that makes him a danger to the community: running his organized criminal enterprise. The Second Circuit in *Colombo* spoke almost directly to the case at bar:

> In our view, these conditions are clearly inadequate to protect the public from one found for bail purposes to be a danger to the community. Prohibiting [him] from associating with his co-defendants in no way prevents him from meeting with others who are members of a criminal enterprise. . . . Prohibiting him from committing a crime or intimidating a witness does not at all impede his ability to do so, and requires no more of him than that which the law already demands from [him] and every other citizen. . . . Finally, the fact that [he] must surrender his passport

> and post a bond tend merely to assure that he will not flee and do not relate to protection of the community. The particular danger . . . is hardly alleviated by [these] type[s] of conditions.

Colombo, supra, 777 F.2d at 100. Accordingly, the government has established by clear and convincing proof that pretrial detention of Salerno is appropriate in this case.

The indictment alleges that defendant Cafaro is a captain, or "capo," in the Genovese Family. The evidence of Cafaro's violent character and present danger to the community is overwhelming. The government's proffer indicated that Cafaro manages the "enforcement" operations of the enterprise. In order to collect debts and enforce the "two-block" rule, Cafaro directs others, including "Artie," "Freddie," "Blood," "Pete" and his own son, to intimidate and frighten the public with threats of bodily harm and actual brute physical violence. He made such threats himself and, being in the possession of at least one automatic weapon and an Uzi machine gun, had the ability to carry them out. His own words intercepted by electronic surveillance, in which he repeatedly directed others to "knock [people's] f----g brains out," are indicative of Cafaro's propensity for violence. Thus, the government has, by clear and convincing proof, demonstrated that Cafaro has directed violent acts and is ready, willing and able to direct violent acts in the future.

The government, therefore, has met its burden of persuasion by clear and convincing evidence that no conditions of Cafaro's release would assure the safety of the community or of any person.

Cafaro joins in Salerno's arguments against detention. Those arguments have even less force with respect to Cafaro. Since he was not indicted in the "Commission" case, the government could not have sought detention earlier as to Cafaro. Moreover, apart from the indictment itself, the proffer as to Cafaro consisted entirely of unimpeachable tape evidence.

Cafaro's contention that his statements which were proffered by the government were merely "tough talk" is rejected by the court. The government has established by clear and convincing evidence that Cafaro was actually conducting the business of the enterprise and that he did so by directing others to commit violent acts.

Cafaro urges the court to consider releasing him on bail on the condition that he not be allowed to go to specified restaurants, social clubs, and offices, and that he surrender his passport, and not associate with other defendants. Such conditions of release would at most assure Cafaro's presence at trial. They in no way assure the safety of the community. Moreover, in view of the substantial evidence proffered, this court cannot envision any set of conditions that could ensure the safety of the community from Cafaro.

The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of its leadership to continue business as usual. When business as usual involves threats, beat-

ings, and murder, the present danger such people pose to the community is self-evident.

Thus, after carefully considering all the factors enumerated in 18 U.S.C. section 3142(g), this court finds that the government has met its burden of proof by clear and convincing evidence that no condition or combination of conditions of release of these defendants will reasonably assure the safety of any other person or of the community.

ORDER

IT IS HEREBY ORDERED THAT defendants Salerno and Cafaro be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal; that they be afforded reasonable opportunity for private consultation with their respective counsel; and that, on an order of a court of the United States or on the request of an attorney for the government, the person in charge of the correction facility in which they are confined deliver them to a United States marshal for the purpose of an appearance in connection with a court proceeding.

SO ORDERED.

Dated: April 2, 1986
New York, New York

/s/ John M. Walker
JOHN M. WALKER
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Third day of July one thousand nine hundred and eighty-six.

Docket Nos. 86-1197
86-1198

UNITED STATES OF AMERICA, APPELLEE

v.

ANTHONY SALERNO and VINCENT CAPARO,
DEFENDANTS-APPELLANTS

Appeals from the United States District Court
for the Southern District of New York

[Filed July 3, 1986]

Present: HON. WILFRED FEINBERG, Chief Judge,
HON. JON O. NEWMAN,
HON. AMALYA L. KEARSE, Circuit Judges.

These causes came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was [*sic*] argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and they hereby are vacated and the actions be and they hereby are remanded to the said district court for further proceedings in accordance with the opinion of this court.

FURTHER ORDERED that the mandate be and it hereby is Stayed until the mandate of this court is issued in *United States* v. *Melendez-Carrion* Nos 85-1341, et al. Slip Opinion 3023 (2nd Cir. May 2, 1986).

ELAINE B. GOLDSMITH
Clerk

By: /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

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Supreme Court, U.S.
FILED
OCT 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-87.

In the Supreme Court of the United States.

OCTOBER TERM, 1986.

UNITED STATES OF AMERICA,
PETITIONER,

v.

ANTHONY SALERNO AND VINCENT CAFARO,
RESPONDENTS.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

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15 pp

Question Presented.

Whether Section 3142(e) of the Bail Reform Act of 1984 is facially unconstitutional under the Due Process Clause of the Fifth Amendment to the United States Constitution insofar as it permits pretrial detention solely on the ground of future dangerousness or, alternatively, if the statute is found to be facially constitutional, whether and under what circumstances permissible regulatory detention may ripen into impermissible punishment in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

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No. 86-87.

In the Supreme Court of the United States.

OCTOBER TERM, 1986.

UNITED STATES OF AMERICA,
PETITIONER,

v.

ANTHONY SALERNO AND VINCENT CAFARO,
RESPONDENTS.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

Anthony Salerno, pursuant to the request of this Court dated September 11, 1986, hereby responds to the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit filed on July 21, 1986, by the Solicitor General on behalf of the United States.

Opinions Below.

The opinion of the Second Circuit Court of Appeals is reported at 794 F.2d 64 (2d Cir. 1986).

Statement.

Respondent respectfully refers the Court to the statement of facts contained in the opinion of the Second Circuit Court of Appeals, *United States* v. *Salerno*, 794 F.2d 64, 66-68 (2d Cir. 1986) (See Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (hereinafter "Petition") at 2a-7a).

Argument.

The decision of the Second Circuit in this case, invalidating § 3142(e) of the Bail Reform Act of 1984, 18 U.S.C. § 3142(e) as facially repugnant to the Due Process Clause of the Fifth Amendment to the United States Constitution insofar as it permits pretrial detention solely on the basis of future dangerousness,[1] does indeed, as maintained by petitioner, present an important question of far-reaching constitutional significance. With so much of the petition which so contends, respondent does not take issue. Respondent does, however, contend that the decision of the Second Circuit Court of Appeals was manifestly correct and that every day of continued incarceration does further violence to respondent's rights to due process of law.

---

[1] [T]he present detention order does not hinge on risk of flight or threats to potential witnesses, jurors, or others involved in the judicial process. The government conceded at the detention hearing that there was no risk that the defendants would flee and not appear for trial. Not was there any finding by the court that the defendants were likely to tamper with or intimidate witnesses or jurors, or otherwise to jeopardize the trial process. . . .

The sole bases for the detention order in this case are the findings that the defendants would, if released, carry on 'business as usual' notwithstanding any release conditions, and that business as usual involves threats and crimes of violence.

United States v. *Salerno*, 794 F.2d at 71 (See Petition at 14a-15a).

The exhaustive and scholarly opinions of Judge Kearse in this case and of Judge Newman in *United States* v. *Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986), provide eloquent refutation of the government's attempted justification of pretrial detention solely on the ground of purported future dangerousness as a valid regulatory measure:

> The Government contends that section 3142(e) is to be upheld simply because preventive detention is a rational means of advancing the compelling state interest in public safety. That cannot be the test for determining the constitutionality of preventive detention. The fallacy of using such a test can be readily seen from consideration of preventive detention as applied to persons not arrested for any offense. *It cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future*. Yet such a police state approach would undoubtedly be a rational means of advancing the compelling state interest in public safety. In a constitutional system where liberty is protected both substantively and procedurally by the limitations of the Due Process Clause, a total deprivation of liberty cannot validly be accomplished [on the sole ground that] doing so is a rational means of regulation to promote even a substantial government interest.
>
> Incarcerating dangerous persons not accused of any crime would exceed due process limits not simply for lack of procedural protections. Even if a statute provided that a person could be incarcerated for dangerousness only after a jury was persuaded that his dangerousness had been established beyond

a reasonable doubt at a trial surrounded with all of the procedural guarantees applicable to determinations of guilt, the statute could not be upheld, no matter how brief the period of detention. It would be constitutionally infirm, not for lack of procedural due proces, but because *the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause*. This means of promoting public safety would be beyond the constitutional pale. The system of criminal justice contemplated by the Due Process Clause — indeed, by all of the criminal justice guarantees of the Bill of Rights — is a system of announcing in statutes of adequate clarity what conduct is prohibited and then invoking the penalties of the law against those who have committed crimes. *The liberty protected under that system is premised on the accountability of free men and women for what they have done, not for what they may do. The Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes*.

. . . As a matter of probabilities, a person lawfully arrested may pose a greater danger than someone not arrested but only suspected of dangerousness, but is very likely less of a risk to the community than many who have been convicted, sentenced, and released from confinement after expiration of their sentences. Just as the Due Process Clause would prohibit incarcerating a person not even accused of a crime in order to prevent his future crimes, it would equally bar preventive detention of a person who has

> been convicted of past crimes and has served his sentence. The Clause must accord similar protection to a person not convicted but only accused of a crime. Moreover, if the arrest is thought to reflect that the person is more deserving of confinement than members of the public not accused of crime, the confinement would offend the procedural component of due process by dispensing with the procedural guarantees of the Fifth and Sixth Amendments that must be observed before past conduct may justify incarceration on grounds of dangerousness.

United States v. *Salerno*, 794 F.2d at 72, *quoting United States* v. *Melendez-Carrion*, 790 F.2d at 1000-01 (emphasis added by Court).

> [t]here can be no doubt that an arrest permits some regulatory curtailment of liberty. Even before probable cause has been found by a neutral magistrate, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein* v. *Pugh*, 420 U.S. 103, 113-14 (1975). In addition, a seizure "reasonable" under the Fourth Amendment permits detention until a determination of probable cause by a judicial officer "promptly after arrest." *Id.* at 125. Furthermore, the Constitution's scheme for a system of criminal justice specifies that arrest is to be followed by trial and plainly implies that reasonable steps may be taken to ensure that the trial will take place. Procedures may therefore be used both to secure the defendant's

presence at trial and to prevent the defendant from aborting the trial by intimidating witnesses or physically harming them. . . . Pretrial detention to avoid undue risks of flight or jeopardy to the trial process [is] not prohibited by a constitutional scheme that relies on the trial process to determine guilt and enforce the criminal law.

Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for holding a trial on the charges for which a defendant has been arrested. It is simply a means of providing protection against the risk that society's laws will be broken. Even if the highest value is accorded to that objective, it is one that may not be achieved under our constitutional system by incarcerating those thought likely to commit crimes in the future. Detention of a person lawfully arrested for past criminal conduct is less important than preventing a defendant's flight, but because this means of preventing crime conflicts with fundamental principles of our constitutional system of criminal justice, while detention to prevent flight serves the principles of that system by guaranteeing that the defendant will stand trial and, if convicted, face punishment.

Permitting an arrested person thought to be dangerous to remain at liberty unquestionably incurs a risk. The prediction of dangerous conduct, however difficult to make and however unreliable, will undoubtedly be correct in some instances. But all guarantees of liberty entail risks, and under our Constitution those guarantees may not be abolished [on the sole ground that] government prefers that a risk not be taken.

Id. at 73-74, *quoting United States* v. *Melendez-Carrion*, 790 F.2d at 1001-03.

While the Second Circuit may have been the first court to invalidate this provision of the act as facially unconstitutional on due process grounds, it is also the first court to have engaged in a searching and comprehensive examination of the issue. *See, e.g., United States* v. *Perry*, 788 F.2d 100, 112-113 (3d Cir. 1986); *United States* v. *Portes*, 786 F.2d 758, 767 (7th Cir. 1985). Moreover, a growing majority of courts which have considered the issue have suggested that prolonged detention may fall afoul of the due process clause, the quality of the incarceration changing at some point in the continuum from permissible regulation to impermissible punishment. *See, e.g., United States* v. *Zannino*, No. 86-1597 (1st Cir. 8/15/86); *United States* v. *Accetturo*, 783 F.2d 382, 387-88 (3d Cir. 1986); *id.* at 392-96 (Sloviter, J. dissenting); *United States* v. *Portes*, 786 F.2d at 768; *United States* v. *Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986); *United States* v. *Colombo*, 777 F.2d 96, 100-01 & n.2 (2d Cir. 1985); *United States* v. *Lo-Franco*, 620 F.Supp. 1324, 1326 (N.D.N.Y. 1985), appeal dismissed sub nom. *United States* v. *Cheeseman*, 783 F.2d 38 (2d Cir. 1986). *Cf. United States* v. *Salerno*, 794 F.2d at 78-79 (Feinberg, C.J., dissenting); *United States* v. *Melendez-Carrion*, 790 F.2d at 1005-09 (Feinberg, C.J., concurring). As persuasively asserted by Chief Judge Feinberg in this case:

> The government's powers of preventive detention in a given case are not limitless. Every other appellate court that has examined the lawfulness of this practice under the Bail Reform Act has indicated that pretrial detention to prevent future crimes may be invalid if unduly prolonged. *Portes*, supra, 786 F.2d at 768 & n.14; *Accetturo*, supra, 783 F.2d at 388; see also *United States* v. *Theron*, 782 F.2d 1510, 1516 (10th Cir. 1986); cf. *United States* v. *Edwards*, supra, 430 A.2d at 1333 (stressing 60-day

time limit of D.C. preventive detention scheme determined to be constitutional). This reflects widespread agreement that the passage of time can tip the scales of the balance mandated by due process.

To put the proposition another way, even legitimate and compelling objectives cannot justify detaining a person indefinitely before trial. At some point in time, the harsh burdens of extended confinement will exceed the bounds of due process. As I stated in my concurring opinion in *Melendez-Carrion*, at 1006-09, lengthy pretrial incarceration can run afoul of the rule that the government may not punish a person not convicted of a crime. *Bell* v. *Wolfish*, 441 U.S. 520, 535-36, 99 S.Ct. 1861, 1871-73, 60 L.Ed.2d 447 (1979). Whether a measure is punitive in nature depends both on whether the action is imposed for the purpose of punishment and whether it is excessive in relation to the legitimate, nonpunitive aims assigned to it. *Schall*, supra, 467 U.S. at 269, 104 S.Ct. at 2412; *Bell* v. *Wolfish*, supra, 441 U.S. at 538-39, 99 S.Ct. at 1873-74.

In *Melendez-Carrion*, Judge Newman and I were willing to assume that Congress did not intend preventive detention under the Bail Reform Act to be a punitive measure. However, the second branch of the due process inquiry demands that confinement before trial not be excessive in relation to the statute's goals. Accordingly, undue prolongation of detention before trial can transform what is initially a valid regulatory measure into punishment prohibited by the Due Process Clause. That is so because the traditional test of distinguishing regulatory from penal measures set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 567-

> 68, 9 L.Ed. 2d 644 (1963), and reaffirmed in *Bell* v. *Wolfish*, supra, looks to whether a measure "involves an affirmative disability or restraint" and whether "it has historically been regarded as a punishment." Detention before trial undoubtedly imposes a major disability and restraint on the defendant. As I explained in *Melendez-Carrion*, detention for a long period of time founded on a person's danger to the community is also so harsh that it comes to resemble a traditional prison sentence. Since none of the traditionally "regulatory" reasons for jailing a person without trial, such as the defendant's propensity to flee or to tamper with witnesses, justify confinement in such a case, such lengthy detention would historically be seen as a punishment. Accordingly, unduly extended incarceration for general dangerousness of persons never convicted of any crime can cross the line separating a valid regulatory measure from punishment imposed in violation of the Due Process Clause. *Melendez-Carrion*, supra at 1008-09.

United States v. *Salerno*, 794 F.2d at 78. The detention here has now lasted more than six months, more than sufficient passage of time to invoke due process considerations. *See, e.g., United States* v. *Melendez-Carrion*, 790 F.2d at 1008 (Feinberg, C.J., concurring) ("I do not suggest that the due process clause necessarily establishes a bright line regulating all periods of pretrial detention. But I am convinced that the general requirements of due process compel us to draw that line at some point well short of the eight months involved here"); *United States* v. *Theron*, 782 F.2d at 1516 (four months' pretrial detention constituted impermissible punish-

ment); *United States* v. *LoFranco*, 620 F.Supp. at 1326 (six months' pretrial detention violates due process clause). *Cf. United States* v. *Edwards*, 430 A.2d 1321, 1332 (D.C. App. 1981) (in banc), *cert. denied*, 455 U.S. 1022 (1982) (pretrial detention for 60 days on ground of dangerousness poses "particularly close" due process question); 18 U.S.C. § 3164(b) (ninety day limit of Speedy Trial Act). The issue of prolonged detention as impermissible punishment in violation of the due process clause was also presented to the Second Circuit in this case and must also be confronted by this Court should it conclude that the provisions of the Act permitting pretrial detention solely on the ground of dangerousness are not facially invalid.

Conclusion.

Respondent cannot contend that the issues presented in this case are not worthy issues for this Court's review. Respondent does, however, urge in light of his continued detention that this Court act promptly and expeditiously in this matter and, should it determine to grant the petition for a writ of certiorari, that it affirm the decision below.

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No. 86-87

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO AND VINCENT CAFARO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether Section 3142(e) of the Bail Reform Act of 1984, which authorizes the pretrial detention of an indicted defendant if no release conditions "will reasonably assure * * * the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)), is unconstitutional on its face.

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In the Supreme Court of the United States

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No. 86-87

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v.

ANTHONY SALERNO AND VINCENT CAFARO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 794 F.2d 64. The opinion of the district court (Pet. App. 33a-57a) is reported at 631 F. Supp. 1364.

JURISDICTION

The judgment of the court of appeals (Pet. App. 58a-59a) was entered on July 3, 1986. The petition for a writ of certiorari was filed on July 21, 1986, and was granted on November 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 3142(e) of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3142(e), provides in pertinent part:

> If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably

assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.

STATEMENT

Respondents Anthony Salerno, the reputed leader of the Genovese organized crime family, and Vincent Cafaro, a reputed "captain" in that organization (see Pet. App. 3a, 35a), are presently charged with various racketeering offenses and violent crimes. The United States sought pretrial detention of respondents pursuant to Section 3142(e) of the Bail Reform Act of 1984 (18 U.S.C. (Supp. II) 3141 *et seq.*) which authorizes the detention of a criminal suspect charged with a crime of violence if no release conditions "will reasonably assure * * * the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)). The district court ordered the detention of respondents based on the government's "overwhelming" evidence that, if released, they would continue to engage in violent criminal behavior (Pet. App. 47a, 55a). The court of appeals agreed that no condition of release would reasonably assure the safety of other persons and the community (*id.* at 13a). It nevertheless reversed, holding that Section 3142(e)'s authorization of pretrial detention based upon a judicial determination of future dangerousness is facially unconstitutional as a violation of substantive due process (Pet. App. 15a).

1. The Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3141 *et seq.*, revised the federal law governing pretrial release of criminal suspects. Section 3141(a) of the Act provides that a judicial officer shall determine whether an arrested person will be released or detained in accordance with the provisions of the Act. 18 U.S.C. (Supp. II) 3141(a). Section 3142(a) sets forth the available options. See 18 U.S.C. (Supp. II) 3142(a). The judicial officer may

order that the person be: (1) released on his own recognizance or upon execution of an unsecured bond;[1] (2) released subject to various specified conditions;[2] (3) temporarily detained to permit revocation of a prior release order, deportation, or exclusion;[3] or (4) detained pursuant to the provisions of subsection (e). *Ibid.*

Section 3142(e) provides that "[i]f, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial." 18 U.S.C. (Supp. II) 3142(e). Upon the government's request, the judicial officer must hold a pretrial detention hearing in cases involving crimes of violence, offenses that may result in a sentence of life im-

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[1] An arrested person qualifies for unsecured release unless "the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. (Supp. II) 3142(b).

[2] A suspect is subject to conditional release if the judicial officer determines that the person does not qualify for release upon his own recognizance or upon execution of an unsecured bond. 18 U.S.C. (Supp. II) 3142(c). Section 3142(c) imposes a mandatory condition that the person refrain from violating federal, state, or local law. 18 U.S.C. (Supp. II) 3142(c)(1). It also describes some of the other monetary and nonmonetary release conditions that may be utilized. 18 U.S.C. (Supp. II) 3142(c)(2)(A-N). The judicial officer must select "the least restrictive * * * condition, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community" (*ibid.*).

[3] The judicial officer may detain a person for up to ten days, to allow notice to the proper authorities, if the person poses a risk of flight or danger to other persons or the community and is (1) on release pending trial or appeal; (2) on probation or parole; or (3) subject to deportation or exclusion under the immigration laws. 18 U.S.C. (Supp. II) 3142(d).

prisonment or death, serious drug-related crimes, and felonies committed by persons who have previously been convicted of other serious crimes. 18 U.S.C. (Supp. II) 3142(f)(1). In addition, the judicial officer must hold a pretrial detention hearing, in response to a government request or upon his own motion, in cases involving a serious risk that the person will flee or attempt to obstruct justice. 18 U.S.C. (Supp. II) 3142(f)(2).

Section 3142(f) also specifies a series of procedural safeguards that accompany the pretrial detention hearing. The person resisting detention may request the presence of legal counsel at the hearing; he may testify and present witnesses on his own behalf; he may cross-examine other witnesses who appear at the hearing; and he may present evidence by proffer. 18 U.S.C. (Supp. II) 3142(f). A judicial officer's finding that no conditions will reasonably assure the safety of other persons and the community must be supported by "clear and convincing evidence" (*ibid.*).

Section 3142(g) specifies the factors that a judicial officer shall take into account in considering whether to detain a criminal suspect. See 18 U.S.C. (Supp. II) 3142(g). These factors include the nature and seriousness of the charges, the weight of the evidence against the suspect, the history and characteristics of that person, and the nature and seriousness of the danger to any person or the community that would be posed by his release (*ibid.*). Section 3142(i) specifies the required contents of a detention order. See 18 U.S.C. (Supp. II) 3142(i). The order must include written findings of fact and a statement of reasons for the detention; it must provide that the person detained be separated to the extent practicable from persons awaiting or serving sentences; and it must direct that the detained individual be afforded a reasonable opportunity for private consultation with his lawyer and be made available for necessary court appearances (*ibid.*). Finally, Section

3145 provides for expedited review of detention orders. 18 U.S.C. (Supp. II) 3145(b) and (c).

2. On March 20, 1986, a federal grand jury returned a 29-count indictment charging respondents and 13 other members and associates of the Genovese organized crime family with various crimes, including conspiracy and substantive racketeering offenses (18 U.S.C. 1962(c)) and (d)); 16 counts of mail fraud (18 U.S.C. 1341) in connection with a construction industry bid-rigging scheme; wire fraud (18 U.S.C. 1343) in connection with the election of Roy L. Williams as General President of the International Brotherhood of Teamsters; eight counts of extortion (18 U.S.C. 1951) from a New York area food company; and the operation of illegal numbers and bookmaking businesses (18 U.S.C. 1955). See Pet. App. 2a-3a, 35a-36a. The racketeering counts of the indictment allege 35 specific racketeering acts, including two separate murder conspiracies (*id.* at 2a-3a).

Respondents were arrested and arraigned on March 21, 1986. The United States immediately moved for pretrial detention pursuant to 18 U.S.C. (Supp. II) 3142(e), and the district court (Walker, J.) held an evidentiary hearing in accordance with 18 U.S.C. (Supp. II) 3142(f). The government submitted evidence demonstrating that respondents have engaged in a continuing course of illegal and violent activity and that no conditions of release would prevent respondents from resuming those activities during the pendency of their trial. The government provided a detailed proffer of anticipated testimony from trial witnesses and evidence obtained through electronic surveillance to demonstrate that respondents posed a continuing danger to the community that justified pretrial detention. See Pet. App. 2a-4a, 34a-45a.

For example, the government disclosed in its proffer that Jimmy Fratianno, a federal witness, would testify that he attended a meeting with high-ranking members of the Genovese family at which respondent Salerno and

others agreed to place a "contract" for the murder of John Spencer Ullo, a California organized crime figure (Pet. App. 37a-38a).[4] The government also disclosed that Angelo Lonardo, another federal witness who is the former "underboss" of the Cleveland organized crime family and a life-long friend of Salerno, would testify that Salerno participated in the decision to murder John Simone, a Philadelphia organized crime figure, and the separate decision to murder Danny Greene and John Nardi, two Cleveland organized crime figures (*id.* at 38a-39a).[5] In addition, the government disclosed evidence obtained through electronic surveillance demonstrating that Salerno and Cafaro routinely used violence to maintain control over the Genovese family's gambling, loansharking, and labor union activities (*id.* at 39a-44a).

In response, Salerno offered testimony from character witnesses and challenged the credibility of the government witnesses. Cafaro offered no evidence. He contended that the electronic surveillance evidence revealed, at most, only "tough talk." Pet App. 44a-45a.

The district court, characterizing the evidence as "overwhelming" (Pet. App. 47a, 55a), found that the government had established by clear and convincing evidence that "Salerno is the head, or 'Boss,' of an organization engaged in extortion, loansharking, illegal gambling, and murder" (*id.* at 47a-48a) and that "Cafaro has directed violent acts and is ready, willing and able to direct violent acts in the future" (*id.* at 55a). The court concluded (*id.* at 56a-57a):

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[4] This murder conspiracy ultimately failed because Ullo learned of the plan and killed the person who had been dispatched to fulfill the contract (Pet. App. 38a).

[5] Simone's body was found on a roadside in Staten Island, shot three times in the head (Pet. App. 38a-39a). The plot to kill Greene and Nardi contemplated their murder in New York. However, they ultimately died in car bombings in Cleveland (*id.* at 39a).

> The activities of a criminal organization such as the Genovese Family do not cease with the arrest of its principals and their release on even the most stringent of bail conditions. The illegal businesses, in place for many years, require constant attention and protection, or they will fail. Under these circumstances, this court recognizes a strong incentive on the part of [the criminal enterprise's] leadership to continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose to the community is self-evident.
>
> Thus, after carefully considering all the factors enumerated in 18 U.S.C. section 3142(g), this court finds that the government has met its burden of proof by clear and convincing evidence that no condition or combination of conditions of release of these defendants will reasonably assure the safety of any other person or of the community.

After making those findings, the court entered an order detaining respondents.[6]

Respondents sought reconsideration of the detention decision, which a second district judge (Lowe, J.) denied (Pet. App. 6a-7a). They then sought review from the court of appeals. That court first rejected Salerno's argument that the government had provided insufficient notice of its intention to use wiretap evidence, holding that Salerno lacked standing to seek suppression of that evidence (*id.* at 9a-12a). The court further concluded (*id.* at 13a) that the evidence proffered by the government "amply supported

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[6] The district court issued a detention order on March 28, 1986. That order, however, was not entered on the court's criminal docket. See Pet. App. 8a. The district court later issued a virtually identical order on April 2, 1986, which was entered on the court's docket on April 7, 1986 (*ibid.*). That order, which the court of appeals treated as the relevant decision (*ibid.*), is reproduced in the appendix to the petition for a writ of certiorari (*id.* at 33a-57a).

the court's findings that the government had proven by clear and convincing evidence that Salerno 'is a danger to the community as the "Boss" of an organization that uses force, violence, and threats of force and violence to further its illegal operations', [quoting *id.* at 48a], and that Cafaro 'has directed violent acts and is ready, willing and able to direct violent acts in the future' [quoting *id.* at 55a]." The court nonetheless reversed the district court's detention decision, concluding that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community" (*id.* at 14a).

The court agreed that a judicial officer may order pretrial detention in response to "risk of flight or threats to potential witnesses, jurors, or others involved in the judicial process" (Pet. App. 14a). It stated, however, that "[t]he sole bases for the detention order in this case are the findings that the defendants would, if released, carry on 'business as usual' notwithstanding any release conditions, and that business as usual involves threats and crimes of violence" (*id.* at 15a). The court concluded that detention for the purpose of protecting community safety is "repugnant to the concept of substantive due process, which we believe prohibits the total deprivation of liberty simply as a means of preventing future crimes" (*ibid.*).

Quoting from Judge Newman's separate opinion in *United States* v. *Melendez-Carrion*, 790 F.2d 984, 1000-1001 (2d Cir. 1986), petition for cert. pending, No. 86-5571, the court of appeals stated:

> "In a constitutional system where liberty is protected both substantively and procedurally by the limitations of the Due Process Clause, a total deprivation of liberty cannot validly be accomplished [on the sole ground that] doing so is a rational means of regulating to promote even a substantial governmental interest."

Pet. App. 16a (bracketed portion added by the court).[7] The court, quoting Judge Newman further, stated (*ibid.*, quoting 790 F.2d at 1001 (emphasis added by the court)):

> "Even if a statute provided that a person could be incarcerated for dangerousness only after a jury had been persuaded that his dangerousness [had been] established beyond a reasonable doubt at a trial surrounded by all of the procedural guarantees applicable to determinations of guilt, the statute could not be upheld, no matter how brief the period of detention. It would be constitutionally infirm, not for lack of procedural due process, but because *the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause.*"

Once again quoting Judge Newman, the court stated that " 'incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes.' " Pet. App. 17a (quoting 790 F.2d at 1001). The court added that "[e]ven the risk of some serious crime, such as destruction of an airliner * * * must, under our Constitution, be guarded against by surveillance of the suspect and prompt trial on any pending charges, and not by incarceration simply because untested evidence indicates probable cause to believe that he has committed one crime and is a risk to commit another one" (Pet. App. 20a).

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[7] In *Melendez-Carrion*, the Second Circuit reversed a district court's detention order on due process grounds in a decision that produced three separate—and inconsistent—opinions from the panel. The Second Circuit denied, without opinion, the government's petition for rehearing with a suggestion for rehearing en banc. Several defendants in that case who were detained on risk of flight grounds have since petitioned for a writ of certiorari.

Chief Judge Feinberg dissented (Pet. App. 23a-32a). He concluded that "detaining indicted defendants under the Bail Reform Act for a limited time on the basis of clear and convincing evidence that nothing short of confinement will prevent them from violating the law while on release does not violate any norm of decency implicit in the concept of ordered liberty, and does not violate the Due Process Clause" (*id.* at 29a). He relied, in part, on this Court's holding in *Schall* v. *Martin*, 467 U.S. 253 (1984), that pretrial detention of juveniles based on their perceived danger to the community is compatible with due process (Pet. App. 24a-25a), observing that the societal interest in protecting the public from violent crime "does not vary in strength with the age of the person to be detained" and that, "[i]f anything, the need to shield the community from the hazards of pretrial crimes committed by adults is more compelling, since adults may have superior access to the means of committing more serious and far-reaching offenses" (*id.* at 25a).

Judge Feinberg added that while "[d]ue process also dictates that the government not pursue its goals through 'conduct that shocks the conscience' " (Pet. App. 26a, quoting *Rochin* v. *California*, 342 U.S. 165, 172 (1952)), "[t]here is nothing inherently shocking to the conscience in using a prediction of future criminality to justify confinement" (Pet. App. 26a). He also concluded that the statutory pretrial detention provisions, as applied in this case, are consistent with due process (*id.* at 29a-32a).

SUMMARY OF ARGUMENT

A. In finding the federal pretrial detention statute unconstitutional on its face, the court of appeals took the position that the Due Process Clause disables the government from detaining any criminally dangerous person who has not been convicted of a crime. In the court's view, no statute authorizing pretrial detention for dangerousness

could withstand constitutional scrutiny, regardless of the brevity of the detention or the strength of the government's showing of dangerousness.[8]

This Court's decisions demonstrate that the court of appeals' due process analysis is wrong. Substantive due process principles do not impose a per se prohibition on the pretrial detention of criminal defendants who are shown to be likely to commit crimes while on release pending trial. Instead, due process requires that a statute authorizing such detention strike an appropriate balance between a defendant's interest in pretrial release and the government's duty to prevent crime. The pretrial detention provisions of the Bail Reform Act of 1984 were carefully formulated to strike the proper balance between the individual's liberty interest and the public's interest in community safety. Because the balance struck by Congress is a reasonable one, the pretrial detention statute should be upheld.

B. This Court has repeatedly recognized that the government may detain potentially dangerous persons as a regulatory measure to protect important public interests. Regulatory detention has long been found to be a constitutionally permissible means to protect the public from a broad variety of dangers, ranging from foreign attack and

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[8] Every other court of appeals that has addressed the issue has disagreed with the court in this case and has upheld the constitutionality of the pretrial detention statute. See *United States* v. *Walker*, Nos. 86-5264 and 86-5272 (9th Cir. Nov. 5, 1986); *United States* v. *Rodriguez*, No. 86-5631 (11th Cir. Oct. 14, 1986); *United States* v. *Simpkins*, No. 86-3049 (D.C. Cir. Oct. 6, 1986); *United States* v. *Zannino*, 798 F.2d 544 (1st Cir. 1986); *United States* v. *Perry*, 788 F.2d 100 (3d Cir.), cert. denied, No. 86-5172 (Oct. 6, 1986); *United States* v. *Portes*, 786 F.2d 758 (7th Cir. 1985); *United States* v. *Accetturo*, 783 F.2d 382 (3d Cir. 1986). See also *United States* v. *Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982) (upholding the federal statute permitting pretrial detention in the District of Columbia).

civil insurrection to the outbreak of contagious disease. The Court has specifically recognized that regulatory detention is a proper means to protect society from the violent or threatening behavior of some of its members. For example, this Court has upheld against due process challenges the pretrial detention of potentially dangerous juveniles and potentially dangerous mentally incompetent defendants. The Court has also upheld detention, prior to deportation and exclusion, of potentially dangerous aliens. The Court's decisions upholding the detention of dangerous individuals in a variety of circumstances demonstrate the fallacy of the rigid position taken by the court of appeals—that criminally dangerous individuals can never be detained because of dangerousness prior to the moment of their conviction.

To the extent that it addressed those cases, the court of appeals suggested that they are exceptional and are distinguishable from the pretrial detention permitted by the Bail Reform Act. For example, the court of appeals distinguished this Court's recent decision in *Schall* v. *Martin*, 467 U.S. 253 (1984), on the ground that juveniles have a diminished interest in freedom from confinement. Closer examination reveals, however, that while this Court considered an individual's age as a relevant factor, the due process inquiry involved a balancing of the individual's liberty interest against the interests of the public in community safety. There is no suggestion in *Schall* that once the individual attains his majority, the community's interest in security must invariably be trumped by the individual's interest in freedom, regardless of the circumstances. In other cases as well, the Court has taken account of the individual's mental and emotional stability, as well as his citizenship status, in determining whether Congress has struck a permissible balance between individual liberty and public safety. In each case, however, the Court has indicated that an individual's threat to the public, standing alone, can provide a sufficient basis for deten-

tion. Contrary to the suggestion of the court of appeals, this Court's decisions regarding the detention of individuals because of dangerousness are simply specific examples of the general principle, embodied in history and practice, that Congress and the state legislatures have substantial latitude to protect the public safety through the detention of particularly dangerous individuals pending further judicial or administrative proceedings. The court of appeals' basic premise—that the Constitution imposes a blanket prohibition on such regulatory restraints—is fundamentally wrong.

C. If the government may in some instances protect the public safety through detention of dangerous persons, the question remains whether the regulatory restraint at issue in this case strikes a permissible balance between individual and community rights. That question entails two inquiries: first, whether the pretrial detention provisions serve a legitimate governmental objective; and second, whether the provisions specify adequate procedural safeguards to protect against an erroneous or unnecessary deprivation of liberty.

The pretrial detention provisions of the Bail Reform Act of 1984 are part of Congress's efforts, spanning 18 years, to establish coherent and fair standards for pretrial release. The provisions respond to the widely recognized and well documented need to protect the public from pretrial crime. Congress designed the pretrial detention provisions to reach a small but identifiable group of particularly dangerous defendants who demonstrate a clear propensity to commit serious crimes while awaiting trial. It expressly addressed the constitutional issues now before this Court and carefully restricted the scope of pretrial detention so as to strike a proper balance between the individual's interest in pretrial release and the government's duty to control crime. Sensitive to the defendant's interests in pretrial liberty, Congress designed these provisions to ensure that

the determination of dangerousness is made in a fair and open hearing, correcting the past practice of sub rosa detention of dangerous defendants through imposition of unattainably high financial conditions of release. The pretrial detention provisions protect the interests of both the criminal defendant and society through a candid and fair appraisal of the danger that the defendant poses to the public. They plainly advance a legitimate governmental objective.

Furthermore, Congress has incorporated into the statute a number of safeguards designed to protect the pretrial liberty interests of criminal defendants. Prior to any consideration of pretrial detention, a judicial officer must find that there is probable cause to believe that the defendant has committed the crime charged. Even then, pretrial detention typically may be invoked only in the case of certain defendants charged or previously convicted of certain serious crimes, and only if a judicial officer determines that no conditions of release can reasonably assure the safety of other persons and the community. The defendant's potential danger to the public is promptly determined in an adversarial proceeding where the defendant is afforded the right to counsel, the right to testify and call witnesses on his own behalf, and the right to cross-examine government witnesses. The government carries the heavy burden of demonstrating, through clear and convincing evidence, that no conditions of release will reasonably assure the public safety. The judicial officer must make an individualized judgment of dangerousness, based on criteria prescribed by statute. If the judicial officer elects to detain the defendant pending trial, he must provide a written explanation of his reasons for detention; that written explanation is then subject to expedited appellate review.

The concept of substantive due process, requiring that legislation strike a reasonable balance between the rights of the individual and the demands of organized society,

accords substantial respect to legislative judgment. That respect is plainly warranted here. Congress, which was clearly sensitive to the important interests at stake, crafted a statute that carefully balances the criminal defendant's pretrial liberty interests against the government's duty to protect the public from crime. The pretrial release provisions of the Bail Reform Act of 1984 satisfy the requirements of the Due Process Clause.

ARGUMENT

PRETRIAL DETENTION FOR DANGEROUSNESS UNDER SECTION 3142(e) OF THE BAIL REFORM ACT OF 1984 DOES NOT VIOLATE THE DUE PROCESS CLAUSE

A. The Due Process Clause Imposes Only a Limited Restriction on Congress's Exercise Of its Legislative Powers

This Court has repeatedly observed that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Walters* v. *National Ass'n of Radiation Survivors*, No. 84-571 (June 28, 1985), slip op. 13; *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981); *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (separate opinion of Holmes, J.). The Court pays great respect to "the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *Walters*, slip op. 13. This respect is particularly appropriate in the face of a substantive due process challenge to a federal statute. As Justice Jackson observed in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 222 (1953) (concurring in part and dissenting in part):

> After all, the pillars which support our liberties are the three branches of government, and the burden could not be carried by our own power alone. Substantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur, as to what is reasonable policy under particular times and circumstances.

Members of the Court have made the same point in more recent times, emphasizing that "the history of substantive due process 'counsels caution and restraint,' " *Regents of the University of Michigan* v. *Ewing*, No. 84-1273 (Dec. 12, 1985) (Powell, J., concurring), slip op. 1, quoting *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion), and that in determining whether legislation complies with the requirements of substantive due process, "we exercise limited and sharply restrained judgment." *Poe* v. *Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., dissenting). To be sure, there has been disagreement whether substantive due process is limited to those interests that are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrified," *Palko* v. *Connecticut*, 302 U.S. 319, 325, 326 (1937), or whether it extends to fundamental liberties not specified in the Constitution, but "deeply rooted in this Nation's history and tradition," *Moore* v. *City of East Cleveland*, 431 U.S. at 503 (plurality opinion). Under either standard, however, a substantive due process claim comes to this Court with a heavy burden of justification to bear. *Bowers* v. *Hardwick*, No. 85-140 (June 30, 1986), slip op. 8.

In this case, respondents' substantive due process claim has not met that burden. Contrary to the conclusion of the court of appeals, there is no absolute prohibition against the detention of dangerous persons as a regulatory measure to ensure public safety. And the Bail Reform Act of 1984 is carefully designed to balance the individual's interest in liberty against the government's interest in protecting the public safety. Accordingly, in the narrow circumstances prescribed by the Act, pretrial detention for dangerousness is constitutionally permissible.

B. The Government May Detain a Potentially Dangerous Person as a Regulatory Measure to Protect the Public Safety

The court of appeals' declaration that the Bail Reform Act is facially unconstitutional rests on the bold assertion

that " 'the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause' " (Pet. App. 16a (emphasis deleted)). The court quoted Judge Newman's separate opinion in *United States* v. *Melendez-Carrion*, 790 F.2d at 1001, to support that assertion. The court failed, however, to cite any binding authority from this Court. We submit that the Due Process Clause does not impose any such per se prohibition. To the contrary, the Due Process Clause has been interpreted to permit the government to restrict a person's physical freedom in the face of clear public need, provided that appropriate procedural safeguards are supplied to protect against unnecessary restrictions on liberty.

1. On numerous occasions, this Court has recognized the government's power to curtail an individual's liberty as a non-punitive regulatory measure to protect substantial public interests. Perhaps the clearest examples arise in times of war and civil disorder. The Court has upheld the President's unreviewable power under the Alien Enemies Act of 1798, ch. 58, 1 Stat. 570 *et seq.*, to detain and deport potentially dangerous aliens during times of war. See *Ludecke* v. *Watkins*, 335 U.S. 160 (1948). In a similar vein, the Court has upheld the government's power to subject American citizens to wartime curfews and relocation requirements. See *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943).[9] The Court has also recognized that the Governor

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[9] The restrictions at issue in those cases have since been criticized as resting on unwarranted racial characterizations. See, *e.g.*, Presidential Proclamation No. 4417, 3 C.F.R. 8 (1977) (describing the Japanese relocation program as "wrong" and a "national mistake[ ]"). However, no one would seriously contend that the government, in the face of a surprise foreign attack, would lack the power to detain suspected spies or saboteurs. Notably, the Constitution itself provides for suspension of the writ of habeas corpus when "in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9, Cl. 2.

of a State possesses broad powers to detain potentially dangerous persons in the event of an insurrection. See *Moyer* v. *Peabody,* 212 U.S. 78 (1909). As Justice Holmes observed in that case, due process "varies with the subject-matter and the necessities of the situation" (*id.* at 84) and may permit "temporary detention to prevent apprehended harm" (*id.* at 85).

The government's power to detain potentially dangerous persons is perhaps broadest during periods of armed conflict or civil insurrection.[10] But it is not limited to those extraordinary circumstances. For example, this Court has repeatedly recognized the government's power to employ regulatory detention in response to the recurring problems of an imperfect society, such as the control of sexual psychopaths and the dangerously insane. See, *e.g., Allen* v. *Illinois,* No. 85-5404 (July 1, 1986); *Addington* v. *Texas,* 441 U.S. 418 (1979); *Minnesota ex rel. Pearson* v. *Probate Court,* 309 U.S. 270 (1940). As the Court explained in the *Addington* case, "The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." 441 U.S. at 426.

The decisions cited above reflect the general principle that "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of

[10] Notably, in all of the cases cited above, the Court upheld the power of an Executive Branch official to impose, through summary proceedings, substantial limitations on an individual's personal liberty. The Bail Reform Act of 1984, by contrast, requires that a judicial officer determine pretrial detention issues subject to legislatively prescribed standards and further judicial review.

the general public may demand." *Jacobson* v. *Massachusetts,* 197 U.S. 11, 29 (1905). In *Jacobson,* Justice Harlan cited quarantine laws, subjecting persons to temporary detention for health reasons, as another familiar example of the principle (*ibid.*). This Court has long recognized that quarantine laws are well within the government's police powers. See, *e.g., Compagnie Francaise de Navigation a Vapeur* v. *Louisiana State Board of Health,* 186 U.S. 380, 387 (1902); *Morgan's Steamship Co.* v. *Louisiana Board of Health,* 118 U.S. 455, 460 (1886).

Immigration laws, providing for temporary detention of foreign citizens pending determination of their right to enter this country, provide yet another example of the general principle that regulatory detention is a permissible means of advancing important public interests. In the immigration setting, this Court has upheld the indefinite detention of a resident alien pending an exclusion hearing. *Shaughnessy* v. *United States ex rel. Mezei, supra.* Similarly, non-resident aliens are subject to detention pending determination of their immigration status. *Wong Wing* v. *United States,* 163 U.S. 228 (1896); *Nishimura Ekiu* v. *United States,* 142 U.S. 651, 662-664 (1892). This Court stated in *Wong Wing* (163 U.S. at 235):

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.

More recently, in *Carlson* v. *Landon,* 342 U.S. 524 (1952), the Court reaffirmed the principles of *Wong Wing,*

holding that it is constitutionally permissible to detain a potentially dangerous resident alien pending deportation proceedings against him. 342 U.S. at 537-542.

The circumstances in which the Court has upheld the detention of dangerous individuals are not limited to civil proceedings. In criminal cases, the Court has permitted the temporary pretrial detention of dangerous defendants in several different settings. For example, the Court has held that there is no constitutional bar to the pretrial detention of potentially dangerous persons who are found to be incompetent to stand trial. *Greenwood* v. *United States,* 350 U.S. 366 (1956). Where the defendant has come "legally into the custody of the United States" through the power to prosecute for federal offenses, and where the district court has found that the defendant is incompetent to stand trial and would be dangerous if released, his commitment, and the legislation authorizing it, "involve an assertion of authority, duly guarded, auxiliary to incontestable national power." 350 U.S. at 375. If the incompetent individual ceases to be dangerous, he must be released; and if it becomes clear that he will never become competent to stand trial, the government must proceed by civil commitment if it wishes to continue to hold him. See *Jackson* v. *Indiana,* 406 U.S. 715, 731-739 (1972). But while the prospect of a trial is a realistic one, and while the defendant remains dangerous, detention is constitutionally permissible. 406 U.S. at 738.

Similarly, in *Schall* v. *Martin,* 467 U.S. 253 (1984), the Court upheld the pretrial detention of juveniles charged with criminal offenses. Rejecting arguments that due process flatly forbids pretrial detention on dangerousness grounds, the Court found that the New York statute served a legitimate regulatory purpose that was compatible with the "fundamental fairness" required by the Due Process Clause. 467 U.S. at 268. The Court pointed out that the New York law "serves the legitimate state objective,

held in common with every State in the country, of protecting both the juvenile and society from the hazards of pretrial crime" (*id.* at 274). The state's interest in community safety, the Court noted, is substantial (*id.* at 264):

> The "legitimate and compelling state interest" in protecting the community from crime cannot be doubted. *De Veau* v. *Braisted,* 363 U.S. 144, 155 (1960). We have stressed before that crime prevention is a "weighty social objective," *Brown* v. *Texas,* 443 U.S. 47, 52 (1979), and this interest persists undiluted in the juvenile context.

On the other side of the balance, the Court pointed out that New York's pretrial detention statute contained procedural provisions that afforded the defendants significant protections against erroneous and unnecessary deprivations of liberty. In light of the substantiality of the public interest and the protections for the individuals' liberty interest, the Court found the New York statutory scheme to be a permissible exercise of the State's regulatory power.

Finally, as the Court observed in the *Wong Wing* case, 163 U.S. at 235, regulatory detention for reasons other than dangerousness to society at large is a familiar and accepted element of the criminal justice system. It is an accepted feature of criminal practice that a criminal suspect may be detained for the period required to complete the proceedings relating to his arrest (*Gerstein* v. *Pugh,* 420 U.S. 103, 113-114 (1975)); that he may be detained for lengthy periods in order to ensure his appearance at trial (*Bell* v. *Wolfish,* 441 U.S. 520, 534 (1979)); and that he may be detained to protect jurors and witnesses from harm (*Carbo* v. *United States,* 82 S.Ct. 662 (1962) (Douglas, Circuit Justice)). If the government can detain criminal suspects for such administrative and regulatory purposes in connection with criminal proceedings, it is

hard to understand why it should not also be permitted to protect the public at large by detaining a defendant who is likely to engage in pretrial crime.

The pretrial detention statute does not grant federal courts a roving commission to ferret out dangerous individuals wherever they may be found. Rather, the inquiry into dangerousness is triggered only when the individual comes within the court's jurisdiction after being charged with a serious criminal offense. In this respect, the respondents' detention in this case is akin to the detention of the indicted but incompetent defendant in *Greenwood* v. *United States, supra,* the indicted pretrial detainees in *Bell* v. *Wolfish, supra,* and the detained arrestees in *Gerstein* v. *Pugh, supra.* In each instance, it was a charge of criminal conduct that brought the defendants within the jurisdiction of the court; the detention was not an end in itself, but was merely ancillary to the criminal case. Thus, it is reasonable for Congress to impose on the courts an obligation not to release highly dangerous offenders who have been brought before the courts on criminal charges, even if it would not be reasonable for Congress to authorize the apprehension and detention of members of the general public on dangerousness grounds.

2. Despite the formidable body of precedent authorizing various forms of detention for dangerousness in civil and criminal settings, the court of appeals maintained—without citation of authority—that detention of a criminal defendant for the purpose of preventing pretrial criminal activity "conflicts with fundamental principles of our constitutional system of criminal justice" (Pet. App. 20a). The court of appeals did acknowledge (*id.* at 14a) that pretrial detention is permissible if a defendant poses a risk of flight or threatens the trial process, but it suggested that pretrial detention to prevent future criminal acts is distinguishable (*id.* at 15a-20a). The court dismissed *Schall* as an exceptional case, stating that juveniles "have an interest in

liberty less substantia' than adults" (*id.* at 21a-22a). The court's reasoning does not withstand analysis.

The court of appeals stated that pretrial detention may be employed to prevent flight or interference with the judicial process, because " 'the Constitution's scheme for a system of criminal justice specifies that arrest is to be followed by trial and plainly implies that reasonable steps may be taken to ensure that the trial will take place' " (Pet. App. 19a (quoting *Melendez-Carrion,* 790 F.2d at 1002 (opinion of Newman, J.)). But as the Court in *Schall* recognized, the government also has a " 'legitimate and compelling state interest' " in preventing crime (467 U.S. at 264). The government's interest in preventing crime is no less substantial than the government's interest in protecting the judicial process that *serves* that goal. The court of appeals failed to provide a satisfactory explanation why pretrial detention cannot be employed to advance both of those related interests.

Relying on Judge Newman's reasoning in *Melendez-Carrion,* the court of appeals suggested that the use of pretrial detention rests on a " 'fallacy' " that emerges by considering the detention of persons who have never been accused of any crime and those who have previously been convicted and have served their sentences (Pet. App. 15a). The court stated that the Due Process Clause would never permit the detention of persons in the latter group, even though they might, as " 'a matter of probabilities,' " pose a greater danger to society than those simply accused of crime (*id.* at 16a-17a). Due process, the court concluded, " 'must accord similar protection to a person not convicted but only accused of a crime' " (*id.* at 17a) to rectify this "anomaly" (*id.* at 18a).

The court's basic premise was wrong; this Court has repeatedly approved detention of dangerous persons who have not been charged with a crime where the circum-

stances demanded that action. See *Shaugnessy* v. *United States ex rel. Mezei,* 345 U.S. 206 (1953); *Moyer,* 212 U.S. at 84-85. As Justice Jackson noted, this concept of due process is not "so paralyzing that it forbids all detention of an alien as a preventive measure against threatened dangers and makes confinement lawful only after the injuries have been suffered." *Mezei,* 345 U.S. at 223 (Jackson, J., concurring in part and dissenting in part); see also *Moyer,* 212 U.S. at 85 ("Public danger warrants the substitution of executive process for judicial process.") (Holmes, J.).

The reason that persons who have served their sentences are not subject to detention (at least until they are charged with another criminal offense) is that society has made the judgment that after a period of incarceration, those persons no longer pose an unacceptable risk of endangering the community. That societal judgment is made through the combined effort of the legislature, in selecting a penalty for the crime; the sentencing judge, in selecting an appropriate sentence; and the parole authorities, in deciding when the individual is prepared for his release into the community. If the judgment is made that a particular class of offenders—or even a particular individual—poses an unacceptable risk of danger to the community, society can respond to that determination by setting an appropriate sentence in the first instance and then adjusting the defendant's release date thereafter. Because those devices are not available in the case of dangerous persons who have been charged with a crime, but have not yet been tried, convicted, and sentenced, society must look to pretrial detention as a means of protecting itself from persons in that group.

Perhaps the most striking feature of the court of appeals' reasoning is the anomaly created by the court's recognition of the circumstances in which pretrial detention is clearly permissible. Under the court's approach, a

judicial officer could detain an alleged street criminal who threatens a judge, juror, or witness, but it would have to release an avowed terrorist who—for example, through threats to bomb an airliner (Pet. App. 20a)—"merely" intends to harm the President, a congressman, or the public at large. The court of appeals would allow a judge to employ pretrial detention to protect his courtroom, but not to protect the innocent public that he serves. Thus, under the court's analysis, a district court could detain the defendant to ensure his prompt appearance for court hearings, but not to prevent him from engaging in the most violent and destructive crimes. We know of no constitutional principle that would compel a legislature to draw such an unappealing distinction.

The court of appeals made only brief mention of this Court's opinion in *Schall* v. *Martin, supra,* which the court sought to distinguish on the ground that it involved the detention of juveniles. Adults cannot be detained under the rationale of *Schall,* the court reasoned, because they have a more substantial interest in pretrial liberty than juveniles, who " 'are always in some form of custody' " (Pet. App. 21a-22a (quoting *Schall,* 467 U.S. at 265)). That observation is not sufficient to justify a different result under a substantive due process analysis. *Schall* indicates that the due process inquiry requires a weighing of the governmental and individual interests. As Judge Feinberg suggested (Pet. App. 25a), the government's interest in detaining adults is certainly greater than its interest in detaining juveniles. Adults commit far more crimes than juveniles (see, *e.g., Schall,* 467 U.S. at 265 n.14) and "may have superior access to the means of committing more serious and far-reaching offenses" (Pet. App. 25a (Feinberg, J., dissenting)).[11] It is far from clear, on the

[11] The facts in this case certainly bear out that observation. Respondents' alleged criminal activities, involving murder for hire, extortion, and supervision of racketeering enterprises, are in no sense child's play.

other side of the balance, that an adult's interest in pretrial release is significantly greater than the juvenile's "undoubtedly substantial" interest. See *In re Winship*, 397 U.S. 358, 365-368 (1970); *id.* at 373-374 (Harlan, J., concurring); *In re Gault*, 387 U.S. 1, 25-27 (1967). It is certainly wrong to conclude that an adult's emancipation from parental control vests him with absolute immunity from pretrial detention, regardless of the extent of the public interest in community safety.[12]

Schall and this Court's other decisions authorizing regulatory detention are not, as the court of appeals suggested, exceptional. Instead, they are simply specific examples of the general principle, embodied in history and

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[12] The court of appeals did not discuss this Court's other decisions, cited above, that permit detention of dangerous persons in a wide range of contexts. In *Melendez-Carrion*, Judge Newman attempted to distinguish those cases dealing with the mentally ill, stating that "[d]etention to prevent dangerous conduct may also be imposed upon those who lack the capacity to be fully accountable for their actions" (790 F.2d at 1003). However, this Court's decisions indicate that it is the mentally ill person's dangerous propensities, rather than his mental disability, that provides the primary justification for detention. See *O'Connor* v. *Donaldson*, 422 U.S. 563, 576 (1975) (holding that confinement of a non-dangerous mentally ill person violates due process). See also *id.* at 582-583 (Burger, C.J., concurring) ("There can be little doubt that in the exercise of its police power, a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.").

In any event, Judge Newman's distinction cannot be reconciled with this Court's decisions authorizing detention of mentally competent dangerous individuals. See *e.g.*, *Shaughnessy* v. *United States ex rel. Mezei*, *supra*; *Carlson* v. *Landon*, *supra*; *Moyer* v. *Peabody*, *supra*. His distinction, permitting the detention of persons who unwittingly or unwillingly engage in crime, but requiring a court to release intentionally vicious defendants, produces a senseless result. The government has a particular interest in preventing the fully deliberated crimes of professional criminals. And the professional criminal does not have an unfettered liberty interest in the exercise of his conscious right of "free choice" to victimize society through crime.

practice, that Congress and state legislatures have substantial latitude to protect the public safety through detention of particularly dangerous individuals pending further judicial or administrative proceedings. Those cases demonstrate that the question whether due process will permit regulatory detention in a particular situation cannot be answered by the invocation of constitutional absolutes. Instead, the determination requires a weighing of the governmental and individual interests in light of the available procedural safeguards. *Schall*, 467 U.S. at 263-264. In the following section, we apply the analysis employed in *Schall* to the Bail Reform Act of 1984.

C. The Bail Reform Act of 1984 Strikes a Proper Balance Between a Criminal Defendant's Interest in Pretrial Liberty and the Government's Duty to Prevent Crime

If substantive due process principles do not forbid pretrial detention in every case, the question is whether the Bail Reform Act of 1984 strikes a reasonable balance between a criminal defendant's interest in pretrial liberty and the government's duty to control crime. As *Schall* v. *Martin, supra,* explains, that question entails two distinct inquiries: first, whether the pretrial detention provisions serve a legitimate governmental objective; and second, whether the procedural safeguards accompanying those provisions adequately protect against erroneous deprivations of liberty. 467 U.S. at 263-264.[13]

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[13] In *Schall,* this Court also considered whether pretrial detention was punitive rather than regulatory. The Court ultimately rejected the lower courts' determination that the detention in question resulted in punishment. 467 U.S. at 269-274. That issue is not present in this case. The court of appeals held here that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a *regulatory measure*" (Pet. App. 14a (emphasis added)). See also *United States* v. *Melendez-Carrion,* 790 F.2d at 1000 (separate opinion of Newman, J.) ("A predominant regulatory purpose of section

1. As we have already observed, "[t]he 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted." *Schall,* 467 U.S. at 264. Congress carefully crafted the pretrial detention provisions at issue here to serve that interest, striking a reasonable balance between the government's duty to control crime and the criminal defendant's substantial interest in pretrial liberty. The legislative history of the Bail Reform Act of 1984 reveals that Congress applied painstaking care and deliberation in formulating the pretrial detention provisions. Those provisions are not " 'arbitrary impositions' " or " 'purposeless restraints' " (*Moore,* 431 U.S. at 502 (quoting *Poe,* 367 U.S. at 543 (Harlan, J., dissenting)). Instead, they advance both the public's interest in preventing pretrial crime and the criminal defendant's interest in fair and candid consideration of appropriate conditions for pretrial release.

The pretrial detention provisions are part of Congress's 18-year effort, initiated by the Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214 *et seq.*, to establish coherent and fair standards for pretrial release. Prior to that Act, the federal courts placed almost exclusive reliance on financial requirements, such as bail bonds, to condition pretrial release. See 18 U.S.C. (1964 ed.) 3141.[14]

3142(e) has been widely identified." (citing cases)). Thus, the court of appeals acknowledged that the pretrial detention provisions of the Bail Reform Act serve a regulatory, not a punitive, function. See generally *Bell* v. *Wolfish,* 441 U.S. 520, 535-539 (1979).

[14] Notably, both federal and state courts in this country have traditionally been empowered to restrain dangerous persons through the venerable common law remedy, described by Blackstone, of "holding to security of the peace." 4 W. Blackstone, *Commentaries* *248-252. That remedy, permitting a court to detain a person likely to engage in criminal behavior unless that person posts a "peace bond," has been widely codified in the United States. See 18 U.S.C. 3043 (repealed by the Bail Reform Act of 1984, Pub. L. No. 98-473, § 204(c), 98 Stat. 1986); Cal. Penal Code §§ 701 *et seq.* (1985); N.H. Rev. Stat. Ann.

Congress grew concerned by the inequities of that practice, recognizing (H.R. Rep. 1541, 89th Cong., 2d Sess. 8-9 (1966)) that "[t]he rich man and the professional criminal readily raise bail regardless of the amount[.] But it is the poor man, lacking sufficient funds, who remains incarcerated prior to trial."

Congress passed the Bail Reform Act of 1966 to remedy the "evils which are inherent in a system predicated solely upon monetary bail" (H.R. Rep. 1541, *supra,* at 9). The statute sought to achieve that end by requiring that the courts release defendants on personal recognizance or unsecured bond unless the court determines "such a release will not reasonably assure the appearance of the person as required" (18 U.S.C. (Supp. II 1966) 3146(a)). The Act further specified that, if other conditions were required, the court should rely, to the extent possible, on non-monetary conditions of release (*ibid.*).

The Bail Reform Act of 1966 made no provision for considering dangerousness in the course of pretrial release for non-capital crimes. The congressional committees that drafted the Act recognized that preventive detention "is intimately related to the bail reform problem" but decided that "the need for reform of existing bail procedures is so pressing that such reform should not be delayed with the

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§ 608 (1974); Tex. Crim. Proc. Code Ann. § 7.02 (1977). Early state court decisions suggest that judicial officers used these common law remedies with great frequency. See, *e.g., Respublica* v. *Donagan,* 2 Yeates 437 (Pa. 1799) (affirming security of the peace and good behavior bond set after defendant acquitted of murder charge); *Commonwealth* v. *Ward,* 4 Mass. 496 (1808); *Key* v. *Commonwealth,* 6 Ky. 495 (1814); *Commonwealth* v. *Bartlett,* 28 Va. 456 (1829); *State* v. *Mills,* 13 N.C. 555 (1830); see also *United States* v. *Grenier,* 26 F. Cas. 36 (E.D. Pa. 1822) (No. 15,262) (peace bond imposed on an individual who had participated in Georgia's rebellion against the United States government). In addition, as we note in the text, it is commonly acknowledged that the courts historically detained dangerous defendants prior to trial through the practice of imposing unattainably high financial conditions of release.

hope of enacting more comprehensive legislation * * *." S. Rep. 750, 89th Cong., 1st Sess. 5 (1965); see also H.R. Rep. 1541, *supra,* at 6 (pretrial detention based on dangerousness "involves many difficult and complex problems which require deep study and analysis").[15]

The close relationship between financial conditions of release and preventive detention resurfaced four years later, when Congress considered the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 155(c), 84 Stat. 570. That legislation comprehensively addressed the "almost complete failure of the law enforcement machinery" within the District of Columbia. See H.R. Rep. 91-907, 91st Cong., 2d Sess. 14 (1970). The House Committee on the District of Columbia concluded that the Bail Reform Act of 1966, which applied to the District of Columbia, had contributed to that failure. It observed that prior to that Act, federal courts, as a matter of engrained practice, had regularly detained dangerous persons through the use of high monetary bond (*id.* at 83). The Committee stated (*ibid.*):

> This sham frequently served the purpose of protecting the community from dangerous defendants, but it also imprisoned people who posed no threat. When the issue of dangerousness silently appeared, there were no set standards or due process safeguards to protect the defendant under suspicion; and since there was no visible determination of dangerousness, there was little or nothing for a court to review.

The Committee noted that the Bail Reform Act of 1966, by addressing only part of this phenomenon, had placed

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[15] Congress did specify that the courts should take a defendant's dangerousness into account when considering pretrial release in capital cases and when considering release pending sentencing or appeal. 18 U.S.C. (Supp. II 1966) 3148.

federal judges in a dilemma. The Committee stated (*id.* at 84-85 (emphasis in original)):

> In striving to eliminate money as a barrier to release, the 1966 legislation was a great step forward, which more than justified its label of reform. At the same time, however, *by totally eliminating dangerousness as a criterion to be considered in setting conditions for pretrial release, the Bail Reform Act ignored the rationale behind 700 years of legal practice.* Today, Federal judges are faced with an agonizing decision when an obviously dangerous defendant stands before them. They must either disregard the compelling mandate behind the new law by setting bail beyond the defendant's means, or they must shut their eyes to community danger. One course perpetuates hypocrisy; the other course is irrational.

The Committee noted the District of Columbia's "devastating experience under the Bail Reform Act of 1966" (*id.* at 87), citing hearing testimony, crime surveys, grand jury investigations, and presidential and judicial reports indicating that released defendants frequently committed crimes while on pretrial release (*id.* at 82-83, 89-90 94-104).[16]

The Committee responded to the "disastrous effect" (H.R. Rep. 91-907, *supra*, at 88) of indiscriminate pretrial release by recommending pretrial detention of criminal

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[16] See *Bail Reforms, Stop and Search, Pretrial Detention, Crimes of Violence, and Juvenile Code: Hearings on H.R. 14334 et al. Before Subcomm. No. 3 of the House Comm. on the District of Columbia,* 91st Cong., 1st Sess. (1969); *Anti-Crime Proposals: Supplement to Hearings on H.R. 14334 et al. Before Subcomm. No. 3 of the House Comm. on the District of Columbia,* 91st Cong., 1st Sess. (1970); see also *Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess. (1970); *Amendments to the Bail Reform Act of 1966: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. (1969).

defendants within the District of Columbia "in certain limited circumstances" (*id.* at 91). It carefully considered the constitutionality of this action (*id.* at 91-93), and drafted provisions that incorporated procedural safeguards "far above the minimum required by due process" (*id.* at 93). Congress concurred in the Committee's recommendations and enacted a federal pretrial detention statute applicable within the District of Columbia. See D.C. Code Ann. § 23-1322 (1981 & Supp. 1985)). The District of Columbia Court of Appeals subsequently upheld the statute against constitutional challenge. *United States* v. *Edwards,* 430 A.2d 1321 (D.C. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982).

Congress, meanwhile, continued to consider whether to enact pretrial detention provisions applicable throughout the federal court system.[17] These efforts culminated in the Bail Reform Act of 1984. After exhaustively examining the public and private interests at stake, Congress provided general authority for the federal courts to employ pretrial detention in appropriate circumstances. The provisions of that Act, and the legislative record supporting

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[17] See, *e.g.*, S. Rep. 98-147, 98th Cong., 1st. Sess. (1983); S. Rep. 97-317, 97th Cong., 2d Sess. (1982); S. Rep. 97-307, 97th Cong., 1st Sess. 1147-1176 (1981); *Bail Reform: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 1st Sess. (1981); *Bail Reform Act – 1981-1982: Hearings on H.R. 3006 et al. Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 97th Cong., 1st & 2d Sess. (1981-1982); *The Global Connection: Heroin Entrepreneurs, Hearings on the Narcotic Sentencing and Seizure Act of 1976 (S. 3411 and S. 3645) Before the Subcomm. to Investigate Juvenile Delinquency of the Comm. on the Judiciary,* 94th Cong., 2d Sess. (1976); see also *Pretrial Release or Detention: Hearings and Markups of H.R. 13403 et al. Before the Subcomm. on the Judiciary of the House Comm. on the District of Columbia,* 94th Cong., 2d Sess. (1976).

them, affirm that Congress struck a proper balance between the government's duty to control crime and the criminal defendant's interest in pretrial liberty.

The Senate Committee on the Judiciary—like the House Committee on the District of Columbia 14 years earlier—concluded that "Federal bail laws must address the alarming problem of crimes committed by persons on release and must give the courts adequate authority to make release decisions that give the appropriate recognition to the danger a person may pose to others if released." S. Rep. 98-225, 98th Cong., 1st Sess. 3 (1983). The Committee cited the widespread consensus, shared by the President, the Chief Justice, the Attorney General, the American Bar Association, and other national organizations, that the Bail Reform Act of 1966 had failed "to recognize the problem of crimes committed by those on pretrial release" (*id.* at 5-6). It noted that "this broad base of support for giving judges the authority to weigh risks to community safety in pretrial release decisions is a reflection of the deep public concern, which the Committee shares, about the growing problem of crimes committed by persons on release" (*id.* at 6).

The Senate Committee found that "[t]he disturbing rate of recidivism" fully justified these concerns, citing studies documenting the problem of pretrial criminality (S. Rep. 98-225, *supra,* at 6). The Committee, which had held extensive hearings on preventive detention (*id.* at 5 n.4), concluded (*id.* at 6-7):

> [T]here is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this limited group of offenders that the courts must be given the power to deny release pending trial.

The Senate Committee acknowledged that a criminal defendant has an important interest in pretrial liberty, but concluded that "[w]here there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate" (S. Rep. 98-225, *supra,* at 7). The Committee ultimately determined, based on its own constitutional analysis and the experience gained under the District of Columbia's preventive detention provisions, that "pretrial detention is not *per se* unconstitutional" (*id.* at 8). The Committee nevertheless formulated the preventive detention provisions with care, observing that "a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect" (*ibid.*).[18]

Finally, the Committee concluded that statutory authorization of pretrial detention would ultimately protect the legitimate interests of defendants (S. Rep. 98-225, *supra,* at 11). The Committee acknowledged the evidence—identified in previous congressional reports—that courts regularly detained defendants perceived as dangerous through the sub rosa method of imposing extremely high monetary conditions (*id.* at 10-11). It suggested that "[p]roviding statutory authority to conduct a hearing focusing on the issue of a defendant's dangerousness, and to permit an order of detention where a defendant poses such a risk to others that no form of conditional release is

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[18] The elaborate procedural safeguards embodied in Section 3142, which we discuss in detail at pages 35-39, *infra,* "were carefully drafted with these concerns in mind" (S. Rep. 98-225, *supra,* at 8). They reflect the wisdom gained through formulation of the District of Columbia's preventive detention provisions, which experience had demonstrated were workable in practice (*id.* at 8-9).

sufficient, would allow the courts to address the issue of pretrial criminality honestly and effectively" (*id.* at 11). The committee added (*ibid.*):

> It would also be fairer to the defendant than the indirect method of achieving detention through the imposition of financial conditions beyond his reach. The defendant would be fully informed of the issue before the court, the government would be required to come forward with information to support a finding of dangerousness, and the defendant would be given an opportunity to respond directly. The new bail procedures promote candor, fairness, and effectiveness for society, the victims of crime—and the defendant as well.

In short, Congress carefully weighed the government's interest in preventing crime against the defendant's interest in pretrial liberty and struck a balance that benefits both interests. Acting in response to widely acknowledged and documented public need, Congress provided the courts with express power to detain defendants who pose a serious danger to the community. Furthermore, it established a systematic and open procedure for assessing pretrial dangerousness, eliminating the past objectionable practices of detaining dangerous defendants by imposition of unattainable financial conditions. Through these efforts, Congress completed the process, initiated 18 years earlier under the Bail Reform Act of 1966, of establishing coherent and fair standards and procedures to guide the courts in making pretrial release decisions. The pretrial detention provisions, whether viewed in isolation or in the context of broad-scale bail reform, plainly serve a legitimate governmental objective.

2. The question remains whether the procedural protections embodied in the pretrial detention provisions provide "sufficient protection against erroneous and unnecessary deprivations of liberty" (*Schall,* 467 U.S. at 274) to ensure

the constitutionality of the federal pretrial detention statute. An examination of those protections confirms that they meet constitutional standards.[19]

As a threshold matter, the Bail Reform Act of 1984 is consistent with this Court's holding that a judicial determination of probable cause is a prerequisite to any extended restraint on the liberty of an adult accused of crime. See *Gerstein* v. *Pugh,* 420 U.S. at 114; accord *Schall,* 467 U.S. at 274-275. As the Senate report explains (S. Rep. 98-225, *supra,* at 18 n.57), in a case in which the defendant has not already been indicted, the Federal Rules of Criminal Procedure require a judicial officer to determine, either prior to or at the time of a suspect's initial appearance, whether there is probable cause to believe that the defendant has committed the crime charged. See Fed. R. Crim. P. 4(a), 5(a). Thus, probable cause must be established prior to any consideration of pretrial detention.

The Bail Reform Act's provisions impose additional limitations on the use of pretrial detention. For example, pretrial detention may be employed only in certain prescribed circumstances. As previously noted (pages 3-4, *supra*), the pretrial detention provisions typically can be invoked only against defendants who (1) have been charged with a violent or capital crime; (2) have been charged with a serious drug-related offense; or (3) have previously been convicted of such crimes. 18 U.S.C. (Supp. II) 3142(f). Furthermore, pretrial detention may be employed only if "after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure * * * the safety of any other person and the community" (18 U.S.C.

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[19] The court of appeals, concluding that pretrial detention would violate due process no matter how extensive the procedural protections (Pet. App. 16a), found no need to address this question.

(Supp. II) 3142(e)).[20] Pretrial detention thus can be considered only as a last resort, after the judicial officer has considered every feasible alternative and has expressly rejected each of them.

Section 3142(f), which governs the pretrial detention hearing, further protects the defendant's pretrial liberty interest through rigorous procedural safeguards. First, the detention decision must be made promptly. Once the government has moved for pretrial detention, an adversarial hearing must be held "immediately upon the defendant's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance" (18 U.S.C. (Supp. II) 3142(f)). The defendant may seek a continuance of up to five days; a longer continuance can be granted on a showing of good cause (*ibid.*). The government may not seek a continuance of longer than three days, except for good cause (*ibid.*). In addition, the defendant is entitled to a full adversary hearing on the detention question. The defendant has the right to be represented by counsel at the hearing, and is entitled to court-appointed counsel if he is financially unable to obtain adequate representation (*ibid.*). The defendant may testify and present witnesses on his own behalf, he may cross-examine government witnesses, and he may present evidence by proffer (*ibid.*).

At the hearing, the government carries the burden of demonstrating that the defendant poses a serious threat to public safety. Section 3142(f) imposes a stringent standard of proof, stating (18 U.S.C. (Supp. II) 3142(f)):

> The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety

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[20] Section 3142(c) provides a list of 13 conditions that may be utilized, in addition to "any other condition that is reasonably necessary * * * to assure the safety of any other person and the community." 18 U.S.C. (Supp. II) 3142(c).

> of any other person and the community shall be supported by clear and convincing evidence.

The "clear and convincing" evidentiary standard is, of course, the same demanding test that is applied to civil proceedings for the indefinite commitment of the mentally ill (*Addington* v. *Texas*, 441 U.S. 418 (1979)), and for deportation (*Woodby* v. *INS*, 385 U.S. 276 (1966)), denaturalization (*Chaunt* v. *United States*, 364 U.S. 350 (1960)), and expatriation (*Gonzales* v. *Landon*, 350 U.S. 920 (1955) (per curiam)).

The judicial officer must make an individualized judgment of dangerousness, based on criteria prescribed by statute. 18 U.S.C. (Supp. II) 3142(g). Those criteria include: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger that would be posed by his release. *Ibid.* If the judicial officer elects to detain the defendant pending trial, he must provide a written explanation of his reasons for detention. 18 U.S.C. (Supp. II) 3142(i). The order must include written findings of fact and a statement of reasons for the detention, it must provide that the person detained be separated to the extent practicable from persons awaiting or serving sentences, and it must direct that the person be afforded a reasonable opportunity for private consultation with his lawyer and be made available for necessary court appearances (*ibid.*). A judicial officer's decision to detain the defendant is subject to expedited judicial review. See 18 U.S.C. (Supp. II) 3145(b) and (c).

As this discussion demonstrates, the pretrial detention provisions of the Bail Reform Act provide extensive substantive and procedural protection to the liberty interests of criminal defendants. They limit the use of pretrial detention to defendants likely to be particularly dangerous, they require a judicial finding—supported by

clear and convincing evidence—that no release conditions can reasonably protect the community, and they provide extensive procedural protections to ensure that the defendant's dangerousness is promptly and accurately assessed. These procedures, like those employed in *Schall,* are constitutionally adequate. There are simply no "additional procedures that would significantly improve the accuracy of the determination without unduly impinging on the achievement of legitimate state purposes" (*Schall,* 467 U.S. at 277 (footnote omitted)).[21]

3. As the foregoing discussion demonstrates, the pretrial detention provisions of the Bail Reform Act of 1984 were not the product of impulse, insensitivity, or whim. The provisions were the culmination of an 18-year congressional effort to improve the Nation's bail procedures for the benefit of both the general public and the criminal defendant. Congress, sensitive to the important interests at stake, carefully crafted the provisions to strike a reasonable balance between the government's duty to control crime and the criminal defendant's pretrial liberty interests, incorporating exacting procedural protections to minimize the possibility of erroneous or unnecessary

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[21] The safeguards employed here are more extensive than those that met this Court's approval in *Schall.* Furthermore, they answer many of the concerns expressed by the dissenting opinion in *Schall* (467 U.S. 281 (Marshall, J., dissenting)). The dissenting opinion noted that the juvenile detention procedures did not require a preliminary finding of probable cause, they applied to all juveniles regardless of their prior records and the severity of the offenses charged, and they did not provide for an assessment of the likelihood or seriousness of future criminal conduct (*id.* at 283). As our discussion above demonstrates, the Bail Reform Act of 1984 addresses each of those concerns. The dissenting opinion gave particular emphasis to the absence of statutory guidance concerning the type of evidence that would be considered in assessing dangerousness and the standard of proof that would be employed (*id.* at 302-303). As noted above, the Bail Reform Act of 1984 sets forth specific criteria for assessing dangerousness and imposes a "clear and convincing" standard of proof.

deprivations of liberty. The provisions were designed in light of the experience gained under the District of Columbia's pretrial detention statute, a prototype enactment that provided a "useful reference" (S. Rep. 98-225, *supra,* at 8) in drafting national legislation.

Congress's judgment has received broad judicial approval throughout the federal courts. Six circuits have expressly rejected due process challenges to the Bail Reform Act's preventive detention provisions. See *United States* v. *Walker,* Nos. 86-5264 and 86-5272 (9th Cir. Nov. 5, 1986) (per curiam order; opinion to be filed); *United States* v. *Rodriguez,* No. 86-5631 (11th Cir. Oct. 14, 1986); *United States* v. *Simpkins,* No. 86-3049 (D.C. Cir. Oct. 6, 1986) (per curiam order; opinion to be filed); *United States* v. *Zannino,* 798 F.2d 544, 546-547 (1st Cir. 1986); *United States* v. *Perry,* 788 F.2d 100, 112-113 (3d Cir.), cert. denied, No. 86-5172 (Oct. 6, 1986); *United States* v. *Portes,* 786 F.2d 758, 767 (7th Cir. 1985). In addition, a number of district courts have also rejected due process challenges to the pretrial detention provisions at issue in this case. See, *e.g., United States* v. *Accetturo,* 623 F. Supp. 746, 762-766 (D.N.J. 1985), aff'd, 783 F.2d 382 (3d Cir. 1986); *United States* v. *Freitas,* 602 F. Supp. 1283, 1290-1291 (N.D. Cal. 1985); *United States* v. *Acevedo-Ramos,* 600 F. Supp. 501, 505-507 (D.P.R. 1984), aff'd, 755 F.2d 203 (1st Cir. 1985); *United States* v. *Hazzard,* 598 F. Supp. 1442, 1450-1452 (N.D. Ill. 1984).

The judgment of Congress also finds support in the similar enactments of a number of state legislatures. Following the District of Columbia Court of Appeals' decision in *United States* v. *Edwards, supra,* upholding the constitutionality of the District's pretrial detention provisions, five states have amended their constitutions or have passed statutes to permit pretrial detention based on a finding of danger to the community. See Ariz. Const. Art. 2, § 22(3); Ariz. Rev. Stat. Ann. § 13-3961B (Supp. 1985);

Cal. Const. Art. I, § 12(b); Colo. Const. Art. II, § 19(b); Fla. Const. Art, I, § 14; Fla. Stat. Ann. § 907.041(4) (1985); Va. Code Ann. § 19.2-120(2) (1983).[22]

In sum, Congress has reached a reasoned judgment—broadly supported by the Executive Branch, the lower federal courts, and a number of states—that pretrial detention, under the circumstances prescribed by the Bail Reform Act of 1984, is consistent with due process. That judgment, reflecting the Nation's consensus that pretrial detention comports with "fundamental fairness," merits great respect.

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[22] In addition, 11 other states have authorized pretrial detention when the defendant is accused of committing, or has been previously convicted of, certain serious non-capital crimes. See Ga. Code Ann. § 17-6-1(b)(1)-(2) (Supp. 1968); Haw. Rev. Stat. § 804-3(b)(2) (Supp. 1984); Ill. Rev. Stat. ch. 38, para. 110-4(a) (1980); Mich. Const. Art I, § 15(a); Neb. Const. Art. 1, § 9; Nev. Rev. Stat. § 178.486 (1967); N.M. Const. Art. II, § 13A; Ore. Const. Art. I, § 14; Ore. Rev. Stat. § 135.240(2)(1953); R.I. Const. Art. I, § 9; R.I. Gen. Laws § 12-13-1.1 (1956); Tex. Const. Art. I, § 11a; Wis. Stat. Ann. § 969.035(2) (1985). Finally, three states (in addition to a number of those listed above) authorize denial of bail for an offense committed while the defendant was already released on bail. See Md. Code Ann. Art. 27, § 616 1/2(c) (Supp. 1985); Mass. Laws Ann. C. 276, § 58, para. 3 (Supp. 1986); Utah Code Ann. § 77-20-1(2) (1982).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States.

OCTOBER TERM, 1986.

UNITED STATES OF AMERICA,
PETITIONER,

v.

ANTHONY SALERNO AND VINCENT CAFARO,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for Respondent, Anthony Salerno.

Summary of Argument.

I. A basic principle of due process commands that an individual may not be punished prior to an adjudication of guilt. Section 3142 of the Bail Reform Act of 1984 enacts a manifestly punitive sanction utterly at odds with this fundamental tenet of due process. While the legislative history surrounding the act's passage takes great pains to articulate a nonpunitive regulatory rationale, the punitive substance and effect of § 3142 are unmistakable by whatever analysis is applied. The statute imposes an affirmative restraint, the total deprivation of liberty, along with all the myriad lesser freedoms which combine to form the whole, of a competent adult; the behavior to which the statute is applicable is already designated as a crime and punishable as such; the deprivation is premised upon

a finding of *scienter*; and most fundamentally, incapacitative incarceration has historically been regarded as punishment and promotes the traditional aims of punishment. It is aimed squarely at the person of the potential detainee rather than at the activity sought to be regulated. Preventive detention on the ground of future dangerousness is "regulatory" precisely in the same manner as is the substantive criminal law, and must be governed by the same principles, principles which absolutely prohibit punishment prior to an adjudication of guilt, such as that inflicted pursuant to 18 U.S.C. § 3142.

II. The sacred liberty of free men and women to be free from restraint is the most fundamental of rights; because of the necessarily sacrosanct nature of this most basic of human freedoms, the Due Process Clause of the Fifth Amendment prohibits the incarceration of competent adult citizens except through the mechanism of conviction for past criminal behavior. The fundamental nature of this freedom has been particularly stressed by this Court in the context of pretrial release, in decisions which reflect the premise rooted in nine centuries of Anglo-American history that the only legitimate function of pretrial incarceration is to assure that the accused can be prosecuted and, if convicted, sentenced. While pretrial detention to prevent flight or witness tampering bears a direct relationship to the preservation of the integrity of the criminal justice system, pretrial detention on the ground of anticipated future dangerousness is not only irrelevant for this purpose but in fact undermines the integrity of the process.

Incarceration of competent adults breaks new and constitutionally forbidden ground in two ways: its purpose is neither therapeutic nor necessary to the operation of the criminal justice system or to the exercise of any other power specifically conferred on the federal government by the Constitution, and persons subject to it suffer from no disability either of status or capacity that would distinguish them from other citizens. Deprivation of the full liberty interest of presumptively innocent competent adults is not, as the government suggests, merely an unexceptionable extrapolation from established

principles; rather, prior decisions of this Court upholding deprivations of liberty under the Due Process Clause all rest upon necessarily dispositive distinctions. While the government interest in protecting the community is undoubtedly an important one, when the naked exercise of governmental power, unsupplemented by any equally weighty but ameliorative state interest such as that inherent in the *parens patriae* power, runs squarely into the right of every competent adult to be free from restraint except upon conviction of crime, its reach is at an end.

III. That § 3142 violates the substantive component of the Due Process Clause becomes only more evident upon reference to the illusory nature of the procedural "protections" provided by the statute. The statutory standards by which the dangerousness of the individual is to be determined are vague and amorphous in the extreme, a defect only exacerbated by the lack of any notice to the defendant of the basis on which the government will contend that he is too "dangerous" to remain free. This vague standard, coupled with the inapplicability of the rules of evidence, the admissibility of hearsay, and the concomitant denial of confrontation rights all combine to destroy any protection which might be afforded by the statutorily prescribed clear and convincing evidence standard. Moreover, the statute effectively denies the defendant the opportunity to challenge the factual predicate of the charges which triggered the detention request. While the imposition of even the most stringent criminal safeguards could not validate detention on grounds of future dangerousness, their absence underscores the invalidity of preventive detention as a matter of substantive due process.

Argument.

The Bail Reform Act of 1984, by explicitly authorizing pretrial detention of persons arrested on criminal charges solely on the ground of their anticipated future "dangerousness" to

society embodies a significant and virtually unprecedented threat to the basic human rights of the adult citizenry of this nation. The government suggests that validation of preventive detention differs neither qualitatively nor quantitatively from many other incursions upon personal liberties which have historically been countenanced as necessary to further weighty governmental interests. What the government seeks to characterize as but a small and unexceptionable extrapolation from established principles is in fact nothing less than a complete break with all traditional notions of fundamental fairness and due process of law, based upon a total disregard for the lessons of history and immutable constitutional imperatives.

What is at issue here is not the right to bail, nor is it the "right" to commit crimes subject only to subsequent conviction and punishment; rather, what is at issue is the fundamental and inalienable right of every competent adult citizen of this country to liberty, to freedom from personal restraint, and to all the myriad liberty interests which flow therefrom, a right so central and so critical to our constitutional system that no governmental interest, whether "compelling" or "important" or merely "legitimate," may justify its deprivation on the ground of future dangerousness. To admit of a permissible balancing equation in this context would eradicate a heretofore sacrosanct line, a line which must remain inviolate.

The Due Process Clause of the Fifth Amendment commands that no competent adult citizen be imprisoned unless convicted of a criminal offense by proof beyond a reasonable doubt arrived at through judicial proceedings which fully comport with the constitutional requisites of a fair trial. Eliminate this line, and there remains no principled basis for the preservation of our historical freedoms. Let there be no mistake: this is no mere rational jurisprudential extension of past precedent as argued by the government; once this historic bulwark is breached, our very liberty is placed in jeopardy of further systematic encroachment until it is reduced to only an abstract concept which pales beside the legislative might.

I. Pretrial Detention Solely on the Ground of Anticipated Future Dangerousness Impermissibly Inflicts Punishment Prior to an Adjudication of Guilt.

"[U]nder the Due Process Clause a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. . . ." *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979). "Fundamental . . . in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial." *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937). *See Ingraham* v. *Wright*, 430 U.S. 651, 672-73 (1977). Detention of a competent adult to prevent future criminal behavior, in the context of a criminal prosecution for alleged past crime, imposes a manifestly punitive sanction utterly at odds with this fundamental and immutable tenet of due process.

While the extensive legislative history surrounding the passage of the statute takes great pains to articulate a nonpunitive, regulatory rationale,[1] "even a clear legislative classification of a statute as 'non-penal' [does] not alter the fundamental nature of a plainly penal statute." *Trop* v. *Dulles*, 356 U.S. 86, 95 (1958). It is not what Congress says about its actions which controls, but rather the purpose inherent in the statute's substantive impact, as distinguished from the form of its language.

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[1] *See, e.g.*, S. Rep. No. 98-225, 98th Cong., 1st Sess. (1983). However, perhaps the true measure of the punitive purpose of § 3142 may best be found not in the carefully crafted reports of legislative committees, prepared in undoubted contemplation of the need to safeguard the statute against inevitable challenge on this ground, *see United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981), *cert. denied*, 455 U.S. 1022 (1982), but rather in floor debate on the matter. *See* 130 Cong. Rec S938-S945 (daily ed. Feb. 3, 1984). The remarks of Sen. Mitchell responding to opposition to his proposed amendment to place a more finite limit on the potential duration of pretrial detention are particularly instructive: "[N]othing better illustrates the lack of understanding of what the American judicial process is about than the repeated references made that if you adopt this amendment, you are going to turn a guilty man loose, as the Senator said or 'Do you want to turn a lot of people loose who are guilty.'" *Id.* at S944 (Statement of Sen. Mitchell). *See also id.* at S941 (Statement of Sen. Thurmond).

See, e.g., Trop v. *Dulles*, 356 U.S. at 95;[2] *United States* v. *Lovett*, 328 U.S. 303, 313 (1946). Any conceptualization of the detention authorized by § 3142 as a valid nonpunitive regulatory measure cannot survive careful scrutiny of the statute in accordance with established principles. While determining the validity of an act of Congress is undoubtedly the "gravest and most delicate duty that this Court is called upon to perform," *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159 (1963), it is a duty which must be fulfilled "with recognition of the transcendent status of our Constitution." *Id.*[3]

> The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an act of Congress is penal or regulatory in character. . . . Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may

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[2] In *Trop*, the Court noted that while in form the statute in question, which provided for automatic loss of citizenship upon wartime court-martial under certain enumerated circumstances, appeared to be a regulation of nationality, "surely form cannot provide the answer to this inquiry. A statute providing that 'a person shall lose his liberty by committing bank robbery,' though in form a regulation of liberty, would nonetheless be penal. Nor would its penal affect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers. The inquiry must be directed to substance." 356 U.S. at 95.

[3] The language of the statute itself contains many indicia of a punitive purpose. It is avowedly part of the criminal laws directed at prevention of crime, an inextricable part of a criminal prosecution aimed at the individual instituted by the federal government. Moreover, the statute inflicts an unspecified term of imprisonment, along with all the attendant stigma, a typically criminal punishment, on the basis of a criminal indictment charging past crime plus evidence intended to indicate a likelihood of future dangerousness, accompanied by an explicit legislative purpose of incapacitation, S. Rep. No. 98-225 at 10, a long recognized purpose of criminal sentencing, along with undeniable deterrence and retributive aspects.

> rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Kennedy v. *Mendoza-Martinez*, 372 U.S. at 168.

Analysis of these factors readily demonstrates the undeniable transcendence of the punitive substance over the regulatory form. As to the first of these factors, whether there is imposed an affirmative disability or restraint, there can admit of no conceivable doubt. Not only is the pretrial detainee deprived of his physical freedom but also of "all that makes life worth living," *Bridges* v. *Wixon*, 326 U.S. 135, 147 (1945); his employment is imperiled, his family relationships impaired, *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975), he is deprived of the freedom to be with family and friends and to form the other enduring attachments of normal life, *Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972), of the freedom of association, *Papachristou* v. *Jacksonville*, 405 U.S. 156 (1972), of the right to travel, *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), of the right to family integrity, *Moore* v. *East Cleveland*, 431 U.S. 494 (1977), and of his personal right to privacy and bodily integrity, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), in sum, of the right to enjoy most of those privileges "long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). *See generally Bell* v. *Wolfish*, 441 U.S. 520 (1979).

Certainly the behavior to which the statute applies is already a crime, *see Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 168, both as to the past behavior alleged to trigger the detention process and as to the future behavior sought to be prevented. Moreover, for similar reasons, the deprivation is premised upon a finding of *scienter*, both in terms of putative responsibility for the crime charged and in terms of an imputed intent to engage in future criminal conduct.

Moreover, and most fundamentally, incapacitative incarceration has historically been regarded as punishment and promotes the traditional aims of punishment.[4] "Isolation of the dangerous has always been considered an important function of the criminal law." *Powell* v. *Texas*, 392 U.S. 514, 539 (1968). "It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent — and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *United States* v. *Brown*, 381 U.S. 437, 458 (1965). *Cf. Specht* v. *Patterson*, 386 U.S. 605, 608 (1967) (incarceration under Colorado sexually dangerous person statute is criminal punishment even though designed not so much as retribution as to keep individuals from inflicting future harm).

In *Schall* v. *Martin*, 467 U.S. 253 (1984), this Court concluded that a New York statute permitting pretrial detention of juveniles was regulatory rather than punitive in purpose, identifying a number of variables which combined to place the detention at issue therein somewhere on the regulatory end of the continuum. None of these ameliorating factors are present here. First, the Court stressed that the period of pretrial detention was strictly limited in time to a maximum possible duration of seventeen days. *Id.* at 270.[5] In stark contrast, the

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[4] The only cognizable exception to the universal equation of incarceration of competent adult citizens for more than the briefest duration as an incident to criminal processing, *cf. Gerstein* v. *Pugh*, 420 U.S. 103 (1975), with punishment is the power to detain for risk of flight. Such a power is essential to the very existence of the criminal justice system and has historical antecedents of such antiquity as to have become incorporated into the very definition of ordered liberty protected by the Due Process Clause; the derivative power to protect those same processes from crippling disruption through witness tampering and similar actions directed at preventing the free and unimpeded operation of the trial process rests upon the same rationale. *See* Section II *infra*.

[5] The Court further noted that this brief time span was directly related to the limited purpose of providing the youth with a controlled environment and separating him from improper influences pending the speedy disposition of the case. *Schall* v. *Martin*, 467 U.S. at 266.

detention imposed under § 3142 is subject only to whatever time constraints may be supplied by the Speedy Trial Act, 18 U.S.C. §§ 3161, 3164, protection which in practice has proven largely illusory in light of the myriad exclusions encompassed within § 3161(h), particularly the open-ended exclusion in the interests of justice permitted by § 3161(h)(8)(B) (ii), resulting not in a sharply limited confinement but rather in a virtually indeterminate one.[6]

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[6]The lack of any finite time limits on the potential duration of detention also distinguishes § 3142 from the statute at issue in *United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981). Any protestations contained in the legislative history regarding the adequacy of the Speedy Trial Act to impose reasonable limitations on the length of time a detainee might remain incarcerated must be entirely discounted. Simple reference to cases decided under the Speedy Trial Act upholding extraordinarily lengthy intervals between indictment and trial because of validly excludable delay quickly demolishes any reliance on the Speedy Trial Act to function as the necessary safeguard. *See, e.g., Henderson* v. *United States*, ___ U.S. ___, 106 S.Ct. 1871 (1986) (in excess of two years from arraignment of last co-defendant to trial); *United States* v. *Novak*, 715 F.2d 810 (3d Cir. 1983), *cert. denied*, 465 U.S. 1030 (1984) (228 day delay upheld under Speedy Trial Act). Since legislative reference to applicable legal standards is elsewhere readily evident in the legislative history, the conclusion is inescapable that Congress recognized the indeterminate nature of the commitment and chose to incorporate it into the Bail Reform Act. Indeed, a conclusion that the failure to ameliorate the potential for extraordinarily prolonged detention was deliberate is inescapable when reference is had to congressional debates relating to and ultimately rejecting the imposition of more finite and/or stringent time limits, *see, e.g.*, 130 Cong. Rec. at S938-S945, a clear manifestation of punitive intent. Experience under the Bail Reform Act amply bears out the potential for lengthy and relatively open-ended detention. Recent statistics show that 307 defendants were detained in custody in excess of 151 days during the period from July 1, 1984, through June 30, 1985. *United States* v. *Accetturo*, 783 F.2d 382, 395 (3d Cir. 1986) (Sloviter, J., dissenting) (upholding detention of a minimum of six months; district court had excluded seven month period of time as validly excludable delay under Speedy Trial Act). *See, e.g., United States* v. *Claudio*, No. 86-1437 (2d Cir. Nov. 20, 1986) (fourteen months' detention already, and trial still eight months away); *United States* v. *Portes*, 786 F.2d 758 (7th Cir. 1985) (eight months); *United States* v. *LoFranco*, 620 F.Supp. 1324 (N.D.N.Y. 1985), *appeal dismissed sub nom. United States* v. *Cheeseman*, 783 F.2d 38 (2d Cir. 1986) (five and one-half months' detention and trial still four months away); *United States* v. *Theron*, 782 F.2d 1510 (10th Cir. 1986) (four months detention, no fixed trial date); *United States* v. *Hall*, No. 85-CR-87 (N.D.N.Y. 1985) (six

Second, the Court found significant the quality of detention imposed, noting that confinement was for the most part in nonsecure halfway houses; where secure detention was deemed necessary, confinement was in a secure juvenile facility in which children lived in dormitories assigned on the basis of age, size, and behavior, wore street clothing, and participated in educational, recreational, and counseling sessions. *Id.* at 271. In striking contradistinction to these relatively benign incidents of confinement, adult pretrial detainees are held in jail or prison facilities, most often in administrative segregation, confined to their cells twenty-three hours per day. *See United States* v. *Melendez-Carrion*, 790 F.2d 984, 999 (2d Cir. 1986). *See also Bell* v. *Wolfish*, 441 U.S. 520 (1979). The conditions of confinement are, at best, identical to those in-

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months detention); *United States* v. *Zannino*, 798 F.2d 544 (1st Cir. 1986) (sixteen months with no fixed trial date). *See also* Bridges, The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation; 73 J. Crim. L. & Crim. 50, 69 (1982) (approximately 10% of all federal criminal cases require more than 360 days processing time). This latter statistic, given the increasing complexity of many federal indictments, such as the one in this case, is undoubtedly conservative in terms of present reality.

Opponents of additional limitations upon the possible length of pretrial detention sought to justify their opposition on the grounds that such restrictions would be unduly burdensome for the government in that complex cases could not be prepared for trial within such short confines, which would result in unwarranted dismissals of indictments, *see* 130 Cong. Rec. at S941. However, such purported concerns are unconvincing in light of the almost plenary control exercised by prosecutors over the timing of the return of indictments, the amount of preindictment preparation, and the timing of arrests pursuant thereto, *see, e.g., United States* v. *Claudio, supra*, subject only to very limited constitutional and statutory constraints. The last ditch attempt to impose more rigid time controls was a modest proposal indeed, providing only that the time limit of the Speedy Trial Act be reduced from 90 to 60 days in cases involving detained defendants, subject to all the exclusions of the Speedy Trial Act, *see* 130 Cong. Rec. at S939, a compromise which would have more than adequately safeguarded any governmental interest in adequate time for pretrial preparation. Rather, Congress elected to shift the burden of delay to the detained defendant, permitting him to escape prolonged pretrial confinement only by insisting on an early trial at the grievous sacrifice of adequate consultation with counsel and pretrial preparation of the defense, a request which if made may nonetheless be thwarted by the government or even by undetained codefendants through the mechanism of the Speedy Trial Act.

flicted as punishment upon persons who have been convicted and sentenced and, all too often, are far more onerous.[7]

Third, the Court in *Schall* relied upon three interrelated attributes of the New York scheme which are entirely inapplicable here: that the statute required the court to consider the best interests of the juvenile in all proceedings, including detention hearings, that the statute had been authoritatively construed as regulatory by the state's highest court, and that detention of juveniles has long been permitted nationwide. *Id.* at 266-68. No such solicitude for the interests of potential detainees is found in the adult context, nor is pretrial detention of competent adults other than completely antithetical to the historical fabric of our nation.[8]

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[7] Ironically, the segregation of pretrial detainees from sentenced prisoners has generally led to harsher rather than more benign conditions of confinement. At best, detainees are subjected to the same humiliating and oppressive restrictions and intrusions as are sentenced prisoners, justified by the reasonable needs of the institution to maintain security and discipline, *see Bell* v. *Wolfish*, *supra*. However, in all too many instances detainees suffer far harsher conditions, being confined in administrative segregation cells for 23 hours per day with significantly curtailed access to the outside world, whether via telephone or personal visits, and the concomitant severe interference with access to counsel and the opportunity to participate in preparation of the defense, *see Stack* v. *Boyle*, 342 U.S. 1, 4 (1951), all without prior adjudication of guilt. And because they have not been convicted of a crime, detainees do not have "inflicted" upon them any rehabilitative programs or work assignments, often the only available activities which stand between an incarcerated person and endless mind-numbing boredom. *Cf. McGinnis* v. *Royster*, 410 U.S. 263, 273 (1973) ("it would hardly be appropriate for the state to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence").

[8] Further rendering inapposite the analysis of *Schall*, the Court therein engaged in a bipartite analysis of the punitive versus regulatory conundrum, first considering whether juvenile preventive detention *per se* was a valid regulatory measure and holding that it was, a conclusion which necessarily imports a finding of nonpunitive purpose. Section II, *infra*. *See Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 186 n.43. Noting, however, that "the mere invocation of a legitimate purpose will not justify *particular restrictions and conditions of confinement* amounting to punishment," *id.* at 269 (emphasis added), the Court then embarked upon the second component of the regulatory-punitive determination; having concluded that the general nature of the legislative scheme was regulatory rather than punitive in *purpose*, based upon

Far from the brief and relatively benign confinement at issue in *Schall*, the incarceration which results from a detention order under § 3142 has all the incidents of what has historically been categorized as "infamous punishment." *See, e.g., Ex parte Wilson*, 114 U.S. 417, 423 (1885); *Mackin* v. *United States*, 117 U.S. 348, 352 (1886); *Wong Wing* v. *United States*, 163 U.S. 228, 237 (1896). *Cf. United States* v. *Waddell*, 112 U.S. 76 (1884). Not only does § 3142 consign persons to incarceration to prevent future crime, historically viewed as a

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numerous considerations applicable to juveniles and not to adults, the Court then turned to consideration of whether the detention scheme was punitive in *effect*, with reference to the conditions of confinement imposed. It was only in this latter context that the Court applied a rational basis analysis, embodied in the last two of the *Mendoza-Martinez* factors: whether the particular condition of confinement is inflicted for purposes of punishment or rather is but an incident of some other legitimate government purpose. *Id.* at 269. In *Bell* v. *Wolfish*, 441 U.S. 520 (1979), the Court had subjected the *conditions* of confinement of adult pretrial detainees to similar scrutiny, *id.* at 537-39 & n.20; the propriety of the detention *per se* was not an issue, the parties having conceded the validity of detention on the basis of risk of flight. *Id.* at 533-34 & n.15.

Similarly, in *Allen* v. *Illinois*, ___ U.S. ___, 106 S.Ct. 2988 (1986), the Court examined the incidents of commitment as a sexually dangerous person, noting particularly that the state had established a system which provided treatment for those committed and offered release after "the briefest time" in confinement, concluding accordingly that the conditions of confinement themselves did not constitute punishment such as to render the proceedings criminal for purposes of the fifth amendment privilege against self-incrimination, but indicating that the conclusion might well be different if the petitioner demonstrated that no treatment was provided or that persons committed under the statute were confined under basically the same conditions as regular prisoners. As in *Bell* v. *Wolfish*, *supra*, the legitimacy of the confinement *per se* of the dangerously mentally ill was not at issue, this power to confine being a long established incident of the police and *parens patriae* powers of the state, *see* Section II, *infra*. The more relaxed scrutiny afforded conditions attendant upon valid confinement simply bears no relationship to the propriety of detention *per se*. In the former context, the detainee has already been deprived of his most fundamental rights, and the question is limited to what the state may impose upon him in furtherance of the purposes for which confinement was ordered and in recognition of the necessities of the institutional confinement; in the latter context arises the incomparably more significant determination of *when* such fundamental deprivations may be imposed in the first instance, an inquiry mandating the most careful and stringent scrutiny.

paradigm of punishment, but it also bears unmistakable retributive and deterrent aspects, retribution for the past crime charged and the perceived intent to commit future crime and deterrence by expanding the reach of the criminal law to punish crime before it occurs, until now thought to be a grotesque anomaly unknown in civilized societies outside the circle of readers of Lewis Carroll.[9]

Moreover, not only does preventive detention carry all the hallmarks of traditional punitive incarceration, except for its putative rehabilitative aspects, it also shares many of the indicia which have historically been held to characterize punishment of different types. "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact." *Cummings* v. *Missouri*, 4 Wall 277, 320 (1866). See *United States* v. *Lovett*, 328 U.S. at 316. While preventive detention looks generally to anticipated future conduct, its invocation is triggered by past conduct, the alleged criminal behavior which underlies the allegations in the indictment, and, in turn, the same past behavior is used to justify an expectation of future criminality, for the concatenation of which incarceration is imposed. "The theory upon which our political institutions rest is, that all men have certain inalienable rights — that among these are life, liberty, and the pursuit of happiness. . . . Any deprivation of any of these rights for past conduct is punishment, and can be in no otherwise defined." *Id.* at 321. *See Ex parte Garland*, 4 Wall 333, 377 (1866).

Traditionally, "[i]n determining whether legislation bases a disqualification on the happening of a certain past event im-

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[9] "The appeal of preventive imprisonment is as old as it is seductive. Witness this classic exchange in Lewis Carroll's Through the Looking Glass. The Queen observes that the King's Messenger is 'in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all.' Perplexed, Alice asks, 'Suppose he never commits the crime?' 'That would be all the better, wouldn't it?' the Queen replies." Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371, 374-75 (1970), *quoting* L. Carroll, Through the Looking Glass 88 (Harper & Bros. ed. 1902) (hereinafter referred to as Tribe).

poses a punishment, the Court has sought to discern the objects on which the enactment in question was focused. Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified." *Flemming* v. *Nestor*, 363 U.S. 603, 613-14 (1960). The essential inquiry is, therefore, whether the statute intends to reach the person or the activity regulated. *See, e.g., Cummings* v. *Missouri*, 4 Wall at 320; *United States* v. *Lovett*, 328 U.S. at 315; *Trop* v. *Dulles*, 356 U.S. at 95-96.

In the context of preventive detention, the status or activity from which the individual is barred is, of course, personal liberty, under the guise of a community safety regulation. The actual focus of the legislation, apparent on its face, is upon the person of the criminal defendant and not upon the activity regulated. Where the "person" is that of a competent adult citizen, the only permissible manner of reaching that person for purposes of crime prevention is through conviction of guilt of a specifically charged federal substantive criminal offense beyond a reasonable doubt through a criminal trial with the full panoply of due process safeguards.[10]

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[10] Where substantial deprivations have been upheld as incidents of a valid regulatory scheme, the nexus between the activity regulated and the activity deprived has been one of essential congruence. For example, in the exercise of their power to regulate the franchise, states may deprive convicted felons of the right to vote, *Richardson* v. *Ramirez*, 418 U.S. 24 (1974). Similarly, in the regulation of the license to practice medicine, a state in prescribing qualifications may disqualify persons with felony convictions, *Hawker* v. *New York*, 170 U.S. 189 (1898), and may similarly prescribe qualifications for government employment generally, *Garner* v. *Board of Public Works*, 341 U.S. 716 (1951); *DeVeau* v. *Braisted*, 363 U.S. 144 (1960). *Compare United States* v. *Brown*, 381 U.S. 437 (1965), *with American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950).

Unless we are prepared to say that the government may "regulate" the circumstances under which competent adult citizens may enjoy their freedom from physical restraint, the requisite correlation is simply absent. Congress may not regulate liberty *per se*, nor may it do by indirection what it may not

Preventive detention on the ground of predicted future criminal behavior is "regulatory" in precisely the same manner as is the substantive criminal law, and must be governed by the same principles, principles which absolutely prohibit punishment prior to an adjudication of guilt, such as that inflicted pursuant to 18 U.S.C. § 3142.

II. Incarceration of Competent Adult Citizens for the Purpose of Preventing Future Crimes, Even if Arguably Regulatory Rather than Punitive, Violates the Due Process Clause of the Fifth Amendment.

The sacred liberty of free men and women to be free from restraint is the most fundamental of rights, a right which "lie[s] at the base of all our civil and political institutions," *Hurtado* v. *California*, 110 U.S. 516, 535 (1884), "deeply rooted in this nation's history and tradition," *Moore* v. *East Cleveland*, 431 U.S. 494, 503 (1977); it is "the matrix, the indispensable condition, of nearly every other form of freedom," *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937). *See Ingraham* v. *Wright*, 430 U.S. 651, 672-73 (1977); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 186; *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972); *Williams* v. *Fears*, 179 U.S. 270 (1900).

Because of the necessarily sacrosanct nature of this most basic of human freedoms, the Due Process Clause of the Fifth Amendment impenetrably circumscribes the power of the federal government to encroach upon the freedom from physical restraint of competent adult citizens except through the mechanism of conviction for past criminal behavior:

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do directly, *see Cummings* v. *Missouri*, 4 Wall at 325, by incarceration of persons charged with crime based upon anticipated future crime as an "incident" of regulatory public safety legislation. Certainly the government has a weighty interest in protecting the community from crime, but "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law." *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

> [T]he total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause. This means of promoting public safety would be beyond the constitutional pale. The system of criminal justice contemplated by the Due Process Clause — indeed, by all of the criminal justice guarantees of the Bill of Rights — is a system of announcing in statutes of adequate clarity what conduct is prohibited and then invoking the penalties of the law against those who have committed crimes. The liberty protected under that system is premised on the accountability of free men and women for what they have done, not for what they may do. The Due Process Clause reflects the constitutional imperative that incarceration to protect society from criminals may be accomplished only as punishment of those convicted for past crimes and not as regulation of those feared likely to commit future crimes.

United States v. *Salerno*, 794 F.2d 64, 72 (2d Cir. 1986), *quoting United States* v. *Melendez-Carrion*, 790 F.2d 984, 1001 (2d Cir. 1986).

While liberty and property "interests" may properly be arranged along a continuum determined by the perceived importance of the right at stake and the countervailing governmental interest, at the end of that continuum stands a wall erected by the Due Process Clause which no governmental interest — rational, important, compelling or otherwise — may surmount. Yet it is this very constitutional wall, the bulwark of all our cherished freedoms, long enshrined in our history and traditions, *see Poe* v. *Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting), which the government terms "unappealing" (Brief for Petitioner at 25) and "hard to understand" (Brief for Petitioner at 21).

The concern for liberty of the person was enshrined in our Constitution even before the passage of the Bill of Rights, in Article I, Section 9, the habeas corpus clause, "the great object

of which is the liberation of those who may be imprisoned without sufficient cause." *Ex parte Watkins*, 3 Pet. 193, 208 (1830). *See also Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866). The habeas corpus clause was given a body of content by the Bill of Rights, particularly the interrelated protections of the constitutional right of freedom from imprisonment erected by the Fourth, Fifth, Sixth, and Eighth Amendments, the substantive contents of which all coalesce to produce that liberty which may not be deprived without due process of law.

The Sixth Amendment in particular emphasizes the fundamental nature of the right to freedom from restraint by sharply curtailing the circumstances under which it may be denied "in all criminal prosecutions," circumstances which include, under the Due Process Clause, a requirement that guilt be found only on proof of past crime beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), a standard of proof which "provides concrete substance for the presumption of innocence — that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation of the administration of our criminal law." *Id.* at 363. In the particular context of pretrial status during the pendency of a criminal prosecution, this Court has many times underscored the fundamental nature of this freedom.[11]

> This traditional right to freedom before conviction permits the unhampered preparation of a defense and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

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[11] Respondent does not contend herein that the Eighth Amendment confers an absolute right to bail but rather that it does, as set forth *infra*, circumscribe the power of Congress to restrict access to bail for purposes other than those so long recognized as essential to the operation of the judicial system as to have become already implicit in the concept of liberty. Thus, based upon the Eighth Amendment and its historical antecedents, it cannot really be said that detention to prevent flight is in fact "regulatory" in nature; it is not a restriction overlaid upon our traditional conceptions of liberty but rather one which is inherent therein by virtue of nine centuries of historic fact.

Stack v. *Boyle*, 342 U.S. 1, 4 (1951).[12] Justice Jackson in concurrence, joined by Justice Frankfurter, elaborated upon the fundamental nature of the right at stake:

> The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.

Id. at 7. *See Schilb* v. *Kuebel*, 404 U.S. 357, 365 (1971). The views of the Court expressed in *Stack* v. *Boyle* are a simple and eloquent reiteration of the Court's pronouncements on the matter of bail from the early days of the republic.

> Bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon.

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[12] While this Court has indicated that the presumption of innocence has no bearing upon the *conditions* of confinement of pretrial detainees validly held because of risk of flight, *Bell* v. *Wolfish*, 441 U.S. at 533, the presumption is one of the several facets of the constitutional protection against imprisonment which demand that pretrial detention be strictly limited to those circumstances in which it is essential to preserve the functioning of our criminal justice system. "The burdens of pretrial detention are substantial ones to impose on a presumptively innocent man, even when there is probable cause to believe he has committed a crime." *Baker* v. *McCollan*, 443 U.S. 137, 153 (1979) (Stevens, J., dissenting). The presumption of innocence referred to in *Stack* v. *Boyle* must be viewed as representing a commitment to the proposition that a man accused of crime is entitled to freedom and respect as an innocent member of society; only those deprivations necessary to assure the progress of the proceedings pending against him, which deprivations do not rest upon an assumption of guilt, may be squared with this "basic postulate of dignity and equality." Tribe, *supra* n. 9, at 404.

> It is not disguised as a satisfaction of the offense, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment, which the law ordains for his offense.

Ex parte Milburn, 34 U.S. 704, 710 (1835). *See also United States* v. *Motlow*, 10 F.2d 657, 659 (7th Cir. 1926) (Butler, J., as Circuit Justice) ("The Eighth Amendment . . . implies, and therefore safeguards, the right to give bail at least before trial. The purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given. The provision forbidding excessive bail would be futile if magistrates were left free to deny bail"); *United States* v. *Ryder*, 110 U.S. 729, 736 (1884) ("the object of bail in criminal cases is to secure the appearance of the principal before the Court for the purpose of public justice"); *Hudson* v. *Parker*, 156 U.S. 277, 285 (1895) ("a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment"); *Carbo* v. *United States*, 82 S.Ct. 662, 667 (1962) (Douglas, J., as Circuit Justice) ("Denial of bail should not be used as an indirect way of making a man shoulder a sentence for unproved crimes"); *Williamson* v. *United States*, 184 F.2d 280, 282 (2d Cir. 1950) (Jackson, J., as Circuit Justice) ("[it is] difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated and yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it. . . .").[13]

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[13] *Carlson* v. *Landon*, 342 U.S. 524 (1952), decided by a sharply divided court later the same term as *Stack* v. *Boyle*, does not detract from the content previously assigned to the Eighth Amendment. In *Carlson*, the Court rejected by a 5-4 vote the argument that the Eighth Amendment granted alien Communists arrested on deportation warrants the same constitutional right to bail afforded citizens charged with crime. The Court's statement in *dictum* that the Eighth Amendment merely protects against excessive bail in cases in which

The entirety of the bail jurisprudence of this Court reflects the antecedents of the Eighth Amendment deeply rooted in Anglo-American history, which has rested for nine centuries on the premise that the only legitimate function of pretrial incarceration was to provide assurance that the accused could be prosecuted and if convicted, sentenced. Tribe, *supra* n.9 at 402. While the historical record may not support the proposition that there is an absolute right to bail, to derive from that modest concession to the essential demands of the judicial system a sweeping legislative power to restrict access to bail for reasons unrelated to those demands is to utterly misread the teachings of history and to reduce the Eighth Amendment "below the level of a pious admonition." *Carlson* v. *Landon*, 342 U.S. 524, 542 (1952) (Black, J., dissenting). Whatever conclusion one may reach regarding the evolution of bail in England,[14] "our Bill of Rights was written and adopted to guar-

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bail may be granted and does not prevent Congress from defining classes of cases in which bail may be denied can only be read in the context in which it was made, an area to which the Court expressed some doubt that the Eighth Amendment was even applicable, deportation being a civil and not criminal proceeding. Moreover, the federal government has plenary power to regulate aliens, their admission to this country and the conditions under which they may remain. *See, e.g., Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953); *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896). Furthermore, bail was not denied entirely but was discretionary with the Attorney General and subject to judicial review. And most importantly, the court in referring to "classes" of cases in which Congress could restrict access to bail, clearly had reference to classes other than the class of criminal cases, in which class the only permissible curtailment was that for capital cases. As discussed further, *infra*, the exception for capital offenses has a firmly established historical basis, and nothing in this Court's opinion may be read to contemplate further encroachments on the right to bail in criminal cases as a class, notwithstanding Congress' power to restrict access to bail in deportation cases as a class.

[14] Numerous commentators have traced the history of bail in England. *E.g.*, Tribe, *supra* n.9 at 400-02; Hickey, Preventive Detention and The Crime of Being Dangerous, 58 Geo. L. Rev. 287 (1969) (hereinafter referred to as Hickey); Foote, The Coming Constitutional Crisis in Bail, 113 U. Pa. L. Rev. 959 (1965); Duker, The Right to Bail: A Historical Inquiry, 42 Alb. L. Rev. 33 (1977); Meyer, Constitutionality of Pretrial Detention, 60 Geo. L.J. 1139 (1972). In addition, several judicial decisions have painstakingly analyzed the

antee Americans greater freedom than had been enjoyed by their ancestors who had been driven from Europe by persecution." *Id.* at 557.[15] In this country, the Judiciary Act of 1789, adopted at the same time as the Eighth Amendment, established a right of bail in all except capital cases, leaving release on bail in those cases to the discretion of the federal judiciary. This formulation essentially followed, and was in turn followed by, state constitutional provisions, beginning with the Pennsylvania Frame of Government, adopted in 1682, which provided "[t]hat all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption great." By 1960 forty states had adopted essentially the same clause. Identical language was incorporated in the Northwest Territory Ordinance of 1787, art. II, 1 Stat. 13. *State* v. *Konigsberg*, 164 A.2d at 742.

There is, accordingly, a historical basis for restricting bail in capital cases but not otherwise, and the historical record convincingly demonstrates that the basis for this exception was not the imputed dangerousness of the capital defendant but rather the perception that a well-nigh uncontrollable urge to flee might well understandably seize one in danger of the ultimate penalty; to that end the judiciary was instructed to look to the strength of the proof to determine how strongly the jeopardy of conviction might be felt by the accused. *See, e.g., United States* v. *Melendez-Carrion*, 790 F.2d at 997:

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historical background. *E.g., Hunt* v. *Roth*, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot*, 455 U.S. 478 (1982) (*per curiam*); *Faheem-El* v. *Klincar*, 620 F.Supp. 1308 (N.D. Ill. 1985); *United States* v. *Edwards*, 430 A.2d 1321 (D.C. App. 1981); *State* v. *Konigsberg*, 33 N.J. 367, 164 A.2d 740 (1960).

[15] James Madison remarked in proposing the Bill of Rights to Congress:

> In the declaration of rights which that country [England] has established, the truth is, they have gone no further than to raise a barrier against the power of the Crown; the power to legislate is left altogether indefinite. . . . But although it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States. The people of many states have thought it necessary to raise barriers against power in all forms and departments of government.

1 Annals of Cong. 18, 46-50 (Gales & Seaton ed. 1789-1791), *quoted in United States* v. *Edwards*, 430 A.2d at 1367 (Mack, J., dissenting).

Hunt v. *Roth*, 648 F.2d at 1160; *State* v. *Konigsberg*, 164 A.2d at 743; 4 W. Blackstone, Commentaries on the Laws of England 293-94 (4th ed. 1770); Tribe, *supra* n.9 at 377.

The entire history of bail in this country reflects a "profound judgment about the way in which law should be enforced and justice administered," *In re Winship*, 397 U.S. at 361, mandating that access to bail be denied only when there is a significant risk that the judicial process itself will be thwarted, characteristically through the flight of the defendant, and later extended to encompass threats to the integrity of its processes through witness tampering and the like. *E.g.*, *Carbo* v. *United States*, 82 S.Ct. 662 (1962) (Douglas, J., as Circuit Justice); *Fernandez* v. *United States*, 81 S.Ct. 642 (1961) (Harlan, J., as Circuit Justice). The government's characterization of detention as "ancillary" to the criminal case, rendering it reasonable for Congress to impose upon courts the obligation to detain criminal defendants believed to pose a danger to the community completely misperceives the historic function of bail to preserve the liberty of the individual while ensuring the continued integrity of the judicial system. Conditional release pending trial, which may itself impose substantial and onerous restrictions on personal liberty, *see Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975), except where essential for the criminal justice system to perform its designated function, strikes the only balance permissible in this context. While the power to detain based upon risk of flight or threat to the integrity of the judicial process may be essential to the continued validity of a system which depends entirely for the achievement of its purposes upon its ability to carry out its adjudicatory and dispositional mandates upon the presence of the accused and the uncoerced testimony of witnesses, pretrial detention on grounds of dangerousness to the community is irrelevant for these purposes.[16]

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[16] As the legislative history of § 3142 explains, the statutory reference to danger to any specific individual in the community refers simply to the established power to detain if the defendant poses a danger to witnesses or others involved in the judicial process, whereas danger to the community encompasses future criminal behavior detrimental to society as a whole. S. Rep. No. 98-225

Accordingly, *Bell* v. *Wolfish*, 441 U.S. 520 (1979), in which the only ground for detention asserted was that of risk of flight, *id.* at 534 and n.15, has no bearing upon the validity of pretrial detention on the ground of future dangerousness. Neither does *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), in any way suggest the permissibility of such detention. *Gerstein* held no more than that pretrial restraint of liberty, whether through restrictive release conditions or as a result of inability or failure to post the required bond, must be premised at a minimum upon a finding of probable cause. *Gerstein* does not sanction pretrial detention, but rather comprehends a restriction upon liberty closely related to the rationale underlying detention where a risk of flight appears, that is, restraint for so long as is necessary for the criminal justice system to attach to the person and compel submission to its processes. 420 U.S. at 114, 120. Probable cause does not justify or empower pretrial detention; it is simply a prerequisite for the institution or the continuation of the process, a necessary but not sufficient predicate for restraint, which may include detention where necessary to permit an adjudication of guilt or innocence.[17]

> Pretrial detention to prevent future crimes against society at large, however, is not justified by any concern for

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at 12. The arguments presented herein are addressed only to detention based upon danger to the community as a whole, there being no evidence that respondent posed any danger to witnesses or to the judicial process. *United States* v. *Salerno*, 794 F.2d at 71.

[17] *Gerstein* must also be read in light of *Stack* v. *Boyle*, 342 U.S. 1 (1951), which articulates the permissible limits of pretrial detention; *Gerstein* provides an additional measure of protection by prohibiting even detention as a flight risk absent probable cause as to the commission of the offense charged. Moreover, while *Gerstein* intimates that Fourth Amendment standards define the necessary due process balance governing seizures of persons pending trial, even for the purposes of extended restraints, 420 U.S. at 125 n.27, the role of the Due Process Clause itself in imposing its own substantive limits cannot be doubted. *See, e.g.*, *Schall* v. *Martin*, 467 U.S. 253 (1984); *Bell* v. *Wolfish*, 441 U.S. 520 (1979). Nothing in *Gerstein* purports to determine the substantive limitations on the available grounds for pretrial detention imposed by the Due Process Clause.

> holding a trial on the charges for which a defendant has been arrested. It is simply a means of providing protection against the risk that society's laws will be broken. Even if the highest value is accorded to that objective, it is one that may not be achieved under our constitutional system by incarcerating those thought likely to commit crimes in the future. Detention of a person lawfully arrested for past criminal conduct is unconstitutional not because preventing crime is less important than preventing a defendant's flight, but because this means of preventing crime conflicts with fundamental principles of our constitutional system of criminal justice, while detention to prevent flight serves the principles of that system by guaranteeing that the defendant will stand trial and, if convicted, face punishment.

United States v. *Salerno*, 794 F.2d at 73, *quoting United States* v. *Melendez-Carrion*, 790 F.2d at 1002.

Rather, our constitutionally based criminal justice system demands that incarceration for purposes of crime prevention be achieved only through conviction for past crime, with all the attendant safeguards required to ensure, insofar as it is humanly possible, that no innocent person be condemned. *See In re Winship*, 397 U.S. at 364. The insistence upon past conduct as the only constitutionally acceptable predicate for preventive incarceration is manifest in the basic principle of our criminal law that

> [p]unishment for status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense. . . . This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes.

Powell v. *Texas*, 392 U.S. 514, 543 (Black, J., concurring). For this reason, this Court has consistently rejected state attempts to extend the reach of their criminal laws to punish on the basis of status unconnected to criminal behavior that is within the state's competence to prosecute, *Robinson* v. *California*, 370 U.S. 660, 667 (1962), or on the basis of behavior, unexceptionable in itself, but perceived as a potential precursor of criminal behavior, *Thompson* v. *Louisville*, 362 U.S. 199 (1960), or on the basis of ill-defined associational behavior sought to be justified as a crime prevention measure, *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939). *Cf. Stanley* v. *Georgia*, 394 U.S. at 557.

Similarly, predictions of future behavior of competent adult citizens have until the enactment of the Bail Reform Act of 1984 been a permissible basis for judicial and/or administrative decisionmaking which impacts upon the freedom of the individual only after an adjudication of guilt, for example, in sentencing determinations, *Barefoot* v. *Estelle*, 463 U.S. 880, 896 (1983); *Jurek* v. *Texas*, 428 U.S. 262, 274-75 (1976), in determining whether to grant parole, *Greenholtz* v. *Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979), or whether parole or probation having once been granted should be revoked, *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973); *Morrissey* v. *Brewer*, 408 U.S. 471, 483 (1972).

> That finding [conviction of crime] justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. *Given the previous conviction* and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial. . . .

Morrissey v. *Brewer*, 408 U.S. at 483 (emphasis added).

Any constitutionally cognizable governmental interest in deterrence through incapacitation of competent adults on the basis of future behavior is thus born only of criminal conviction: "the conviction, with all its procedural safeguards, has extinguished that liberty right. . . . '[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty.'" *Greenholtz* v. *Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. at 7.[18]

The government suggests that the Bail Reform Act of 1984 is simply an unexceptionable manifestation of the government's recognized power to curtail freedom as a nonpunitive regulatory measure to protect substantial governmental interests. However, recourse to the examples cited by the government of this Court's validation of such measures quickly demonstrates the essential fallacy of this contention; none of these cases, with the possible exception of the World War II Japanese internment cases, authorize or approve the pretrial detention of competent adult citizens on the grounds of anticipated future dangerousness, either explicitly or implicitly. These cases, by virtue of dispositive distinctions arising from the source of the government power asserted or the less than complete competence of the individual affected, simply fall on the other side of the constitutional barrier and cannot be read to contemplate its breach.

Initially, the question must be addressed whether the restraint of liberty imposed falls within the power, the constitutional competence, of Congress to regulate at all, *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 186 n.43, whether the regulatory scheme which demands it arises "from an affirmative power possessed by Congress under the Constitution." *Id.* at 211

[18] Underscoring the vital significance of an adjudication of guilt in the balance of individual interests against those of the government are numerous noncriminal cases of this Court which turn on either the added boost given to the strength of the government's interest by the fact of conviction or, conversely, upon the greater interests of the individual in its absence. *See, e.g., Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 159; *DeVeau* v. *Braisted*, 363 U.S. at 160; *Richardson* v. *Ramirez*, 418 U.S. 24 (1974); *Hawker* v. *New York*, 170 U.S. 189 (1898). *Cf. Baxstrom* v. *Herold*, 383 U.S. 107 (1966).

(Stewart, J., dissenting). *See United States* v. *Perry*, 788 F.2d 100, 109-11 (3d Cir.), *cert. denied*, 107 S.Ct. 218 (1986) ("Congress may concern itself with 'the safety of the community' only to the extent that other grants of specific power so permit").

The paradigmatic example of regulation of liberty in the exercise of a specifically articulated constitutional power are the war powers cases. *E.g.*, *Ludecke* v. *Watkins*, 335 U.S. 160 (1948); *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943). *Cf. Moyer* v. *Peabody*, 212 U.S. 78 (1909).[19] In both *Korematsu* and *Hirabayashi*, the government asserted an imminent danger of armed invasion of the west coast of this country by the Japanese; the reach of their holdings is sharply circumscribed by "the crisis of war and of threatened invasion," *Hirabayashi* v. *United States*, 320 U.S. at 101.[20] In *Moyer*, the Court held the governor of Colorado immune from liability in damages for a two-and-one-half month detention of the plaintiff during a declared "state of insurrection" because inflicted in good faith reliance upon authorization derived from the state constitution. While the continuing precedential value of *Moyer* is seriously to be doubted, it did not in any event hold that such

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[19] Noteworthy, however, is the fact that even though legislative action pursuant to the war powers clause has necessarily been afforded the highest degree of deference in times of war or armed hostility, even invocation of this most indisputable area of congressional competence has not sufficed to save all action sought to be justified by its operation. *See, e.g., Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963); *Trop* v. *Dulles*, 356 U.S. 86 (1958).

[20] Moreover, subsequent exploration of the validity of the government's claims suggest that this nation would have done well to heed the admonitions of Mr. Justice Murphy, dissenting in *Korematsu*, that "under our system of law individual guilt is the sole basis for deprivation of rights. . . . To give constitutional sanction to [the inference drawn by military authorities] is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual. . . ." *Id.* at 240. "*Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees." *Korematsu* v. *United States*, 584 F.Supp. 1406, 1420 (N.D. Cal. 1984). These cautions are as important in the context of the "war" on crime as in all other types of war hysteria.

detention was affirmatively permissible under the Due Process Clause. These and other cases cited by the government in support of its contention that this Court has "repeatedly" sanctioned the regulatory detention of competent adults, *e.g.*, *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), Brief for Petitioner at 23-24, a highly exaggerated claim in any event, exemplify the worst of our nation's history, periods during which the constitutional vision upon which this nation was founded was sacrificed to the exigencies of the moment, against which we would be ill-advised to measure the depth and breadth of our constitutional freedoms.

While the internment in *Ludecke* was premised upon the exercise of the war powers clause, Ludecke was also an alien, a status which falls within another undoubted area of congressional regulatory competence, the power to exclude or expel aliens being a "fundamental sovereign attribute." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). "Detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid," *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896); *see Ekiu* v. *United States*, 142 U.S. 651 (1892), an exercise of congressional power under the necessary and proper clause markedly analogous to detention to prevent flight from the operation of the criminal processes. *Cf. Carlson* v. *Landon*, 342 U.S. 524 (1952).[21]

Commitment of persons found incompetent to stand trial stands on similar footing, as a valid exercise of the necessary and proper clause. "The petitioner came legally into the custody of the United States. The power that put him into such custody — the power to prosecute for federal offenses — is not exhausted. Its assertion in the form of the pending indictment persists." *Greenwood* v. *United States*, 350 U.S. 366, 375 (1956). While it is "clear that the government's substantive power to commit on the particular findings made in that case

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[21] Even in this area of indisputable regulatory competence, this Court has insisted upon stringent procedural protections which reflect the severity of the proposed deprivation. *See, e.g., Woodby* v. *Immigration & Naturalization Service*, 385 U.S. 276 (1966); *Bridges* v. *Wixon*, 326 U.S. 135 (1945).

was the sole question there decided," *Jackson* v. *Indiana*, 406 U.S. 715, 726 (1972), what *Greenwood* teaches is that Congress may not authorize commitment simply to protect the general welfare of the community at large. As with detention to prevent flight or witness tampering, commitment until competent to stand trial is necessary and proper to the administration of justice in the federal courts, but only for so long as is necessary to determine whether there is a substantial probability that the defendant will attain the capacity to be tried in the foreseeable future; if not, he must either be committed pursuant to the ordinary civil commitment statutes, with their far greater procedural safeguards, or released. *See Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972). In short, detention on the ground of incompetence to stand trial retains its justification as a necessary and proper adjunct of the federal power to prosecute for federal offenses only so long as it appears that such prosecution is possible of consummation.

While detentions such as those considered in cases such as *Greenwood*, *Bell* v. *Wolfish*, *Gerstein* v. *Pugh*, and *Carbo*, may properly be viewed as necessary and proper to the indisputable federal power to prosecute for federal offenses, detention on the ground of potential future criminal behavior bears no such relationship to that power. The power to prosecute does not encompass the power to prevent unless and until the prosecutorial process culminates in an adjudication of guilt.[22]

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[22] The analysis of *United States* v. *Perry*, 788 F.2d 100, 109-11 (3d Cir. 1986), although ultimately reaching a manifestly erroneous conclusion, is nonetheless instructive. The Court noted that the Constitution affords the federal government no power to promote the general welfare, no power to enact general civil commitment statutes, and no power to detain a defendant simply on grounds of undifferentiated dangerousness, but concluded that upon a showing of danger that the defendant would commit one of the federal offenses enumerated in § 3142(e), the detention power arose as "auxiliary" to the power to proscribe these offenses such that the federal government could resort to civil commitment to prevent their occurrence. While *Perry*'s general federalism analysis accurately articulates the sensitive and complex issues involved in determining the legislative competence of a government of limited powers, its ultimate conclusion that the power to commit is a necessary auxiliary of the power to proscribe would sweep within its ambit persons not charged, nor

The remaining instances of permissible regulatory detention have their foundation in the incapacity of the individual to control his behavior to ensure that it remains within the bounds decreed by law. *See, e.g., Allen* v. *Illinois*, ___ U.S. ___, 106 S.Ct. 2988, 2994 (1986); *Jones* v. *United States*, 463 U.S. 354, 361 (1983); *Addington* v. *Texas*, 441 U.S. 418, 426 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563, 575-76 (1975); *Specht* v. *Patterson*, 386 U.S. 605, 608 (1967).[23] "There

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even chargeable, with criminal offenses but found likely to commit one of the designated dangerous offenses in the future.

> It cannot seriously be maintained that under our constitution the Government could jail people not accused of any crime simply because they were thought likely to commit crimes in the future. Yet such a police state approach would undoubtedly be a rational means of advancing the compelling state interest in public safety. In a constitutional system where liberty is protected both substantively and procedurally by the limitations of the Due Process Clause, a total deprivation of liberty cannot validly be accomplished whenever doing so is a rational means of regulating to promote even a substantial governmental interest.

United States v. *Salerno*, 794 F.2d at 72, *quoting United States* v. *Melendez-Carrion*, 790 F.2d at 1001.

In this case, the District Court's determination of future dangerousness rested upon findings that Salerno would, if released, "continue business as usual. When business as usual involves threats, beatings, and murder, the present danger such people pose in the community is self-evident." *United States* v. *Salerno*, 794 F.2d at 67-68. As to Salerno specifically, the District Court found that "[t]he government proffered information showing that Salerno could order a murder merely by voicing his assent with the single word 'hit.' Although some of these murder conspiracies occurred between six and ten years ago, their seriousness and the ease with which they could be ordered weigh heavily in favor of finding that Salerno is a present danger to the community." *Id.* at 67. There was, however, no demonstration in this case that the future crimes the likelihood of commission of which was imputed to Salerno or Cafaro could have been the subject of *federal* prosecution and, indeed, protection of the community against murder and other violent crime is ordinarily the province of the states. A serious question arises as to the basis upon which a prosecution for a federal offense confers a federal power to prevent the future commission of *state* crimes. *Cf. United States* v. *Himler*, 797 F.2d 156, 160 (3d Cir. 1986).

[23] As to the significance of the individual power of control, *compare United States* v. *Brown*, 381 U.S. 437 (1965) (impermissible to criminalize holding of union membership by person who had at any time in past five years been member of Communist Party), *with American Communications Ass'n* v. *Douds*, 339 U.S. 382 (1950) (individuals had power to exclude themselves from the class impacted by the legislation by resignation from Community Party).

Also predicated upon an inability to control rationale are those police/public health power cases dealing with quarantine to protect against dangerous communicable diseases. *E.g., Compagnie Francaise de Navigation a Vapeur* v.

is a striking difference between the involuntary confinement of an individual who is considered dangerous for reasons beyond his control and the involuntary confinement of one who is thought to be capable of conforming his conduct to the requirements of the law but is suspected of being unwilling to do so." Tribe, *supra* note 9, at 379. Moreover, one who suffers from debilitating mental illness and is in need of treatment "is neither wholly at liberty or free of stigma," *Addington* v. *Texas*, 441 U.S. at 426; while the liberty interest of such persons remains substantial, it nonetheless lacks the transcendent force of that of the fully competent adult.

Critical too to the power of civil commitment (including that for sexually dangerous persons and those found not guilty by reason of insanity) is the conjunction of the state's *parens patriae* power with its police power. *See, e.g., Allen* v. *Illinois*, ___ U.S. at ___, 106 S.Ct. at 2994; *Addington* v. *Texas*, 441 U.S. at 426; *O'Connor* v. *Donaldson*, 422 U.S. at 573; *Jones* v. *United States*, 463 U.S. at 368. The person sought to be committed must be shown to be *both* mentally ill *and* dangerous. Just as commitment may not be predicated solely on the *parens patriae* power, *e.g., O'Connor* v. *Donaldson*, 422 U.S. at 576 ("[s]tate cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends"), neither is it permissible solely as an exercise of the police power. *See, e.g., Robinson* v. *California*, 370 U.S. 660, 666 (1962) (criminalization of status as narcotics addict without even purporting to provide treatment); *Allen* v. *Illinois*, ___ U.S. at ___, 106 S.Ct. at 2994 (might regard sexually dangerous commitment as criminal

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Louisiana State Board of Health, 186 U.S. 380 (1902); *Morgan's Steamship Co.* v. *Louisiana Board of Health*, 118 U.S. 455 (1886). *See also Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905) (mandatory smallpox vaccination). In *Jacobson*, the Court viewed the intrusion as set forth in the statute as one of relatively minor proportions, *unless* it could be shown that the individual in question was not a suitable candidate for inoculation by reason of danger to his health which could be caused thereby, at which point the permissible reach of the police power is at its end, *id.* at 37, 39. *Cf. Winston* v. *Lee*, 470 U.S. 753 (1985).

rather than civil proceeding if petitioner able to show no treatment being provided).

Both the control rationale and the necessary duality of purpose underlay this Court's decision in *Schall* v. *Martin*, 467 U.S. 253 (1984). Beginning from the premise that juveniles "*unlike adults*, are always *in some form of custody*," *id.* at 265 (emphasis added), the Court noted that "children by definition are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the state must play its part as *parens patriae*." *Id.* Just as a breakdown in the internal individual control mechanism may justify civil commitment, so too may a failure of the external parental control system warrant state intervention in the life of a juvenile. Moreover, this Court explicitly framed the question for determination as "whether, in the context of the juvenile system, the *combined interest* in protecting both the community and the juvenile himself from the consequences of future criminal conduct is sufficient to justify [pretrial] detention" (emphasis added).[24] *See Ingraham* v. *Wright*, 430 U.S. 651, 652 (1977) (state may impose reasonable corporal punishment in public schools as necessary to the proper education of the child *and* the maintenance of group discipline).

The pretrial detention of competent adults breaks new, and constitutionally forbidden, ground in two ways: its purpose is neither therapeutic nor necessary to the operation of the criminal justice system, and persons subject to it suffer from no disability either of status or capacity that would distinguish them from other citizens. *See* Hickey, *supra* note 14, at 295. The full liberty interest of competent adults, that core value at the heart of all freedom, is so unquestionably indispensable to the perpetuation of our constitutional system that it neces-

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[24] Thus, in answering in part the question left open in *Bell* v. *Wolfish*, 441 U.S. at 534 n.15, whether any governmental objective other than ensuring the presence of the defendant at trial may constitutionally justify pretrial detention, the Court repeatedly stressed the conjunction of the state's *parens patriae* power with its police power to protect the community. Nothing in the opinion intimates that such detention could be sustained in the exercise of the police power alone.

sarily transcends all invocations of governmental power to limit it on the basis that the individual manifests certain characteristics deemed to be inimical to the public interest.[25] While the government interest in protecting the community articulated in *Schall* remains the same in the context of adults, and it is undoubtedly a weighty and important one, when the naked police power, unsupplemented by equally weighty but ameliorative state interests such as those inherent in the *parens patriae* power, runs squarely into the right of every competent adult to be free from restraint except upon conviction of crime, accompanied by the attendant panoply of due process and Sixth Amendment safeguards, its reach is at an end, for it has entered a territory where the weight of the governmental interest, no matter how strong, is no longer controlling. Rather, it is a fundamental tenet of our constitutional system that the incarceration of a citizen, presumably capable of responding to the law's commands, solely in order to prevent future crimes, is anathema unless predicated upon criminal conviction.

III. The Procedures Whereby Pretrial Detention on the Ground of Future Dangerousness May Be Ordered under Section 3142 Are Incompatible with the Fundamental Fairness Required by Substantive Due Process And Fail to Protect Against an Erroneous Deprivation of Liberty.[26]

While, as the government asserts, Congress considered issues relating to bail reform and pretrial detention for many years

[25] As Judge Newman observed in *United States* v. *Melendez-Carrion*, 790 F.2d at 1004: "In only one instance in the constitutional jurisprudence of this country has the Supreme Court upheld the preventive detention of competent adults, prior to conviction of any crime. In *Korematsu* v. *United States* . . . the Court approved the compulsory relocation and related detention of Americans of Japanese descent during World War II to prevent them from committing acts deemed inimical to the Nation's security, indeed its survival. If *Korematsu* is valid today, a proposition seriously to be questioned . . . . it illustrates the rare, possibly unique, circumstance in which preventive detention of a competent adult in a time of national emergency comports with the requirements of due process despite the total deprivation of liberty safeguarded by the Fifth Amendment."

[26] Petitioner addresses the procedural defects of the statute only because the government has sought to sustain the validity of the Bail Reform Act by ref-

prior to arriving at the formulation ultimately adopted, those years of study reflect less a careful concern for the rights of the individuals affected than a calculated concern to appear to be so doing. Nowhere is the reality of this essential disregard for the fundamental liberty right of all competent adults more evident than in the largely illusory procedural "protections" set forth in § 3142, in phrases which recite the appropriate language on the one hand while on the other hand rob them of any meaning or practical effect.

The extraordinary vagueness of the applicable standard, whether any condition or combination of conditions will reasonably assure "the safety of any other person and the community," 18 U.S.C. § 3142(e), fails to provide either adequate notice to the defendant of what he must defend against or adequate guidance to the judicial officer as to what precisely he must find. The legislative history counsels that the act is intended to apply only to "a small but identifiable group of particularly dangerous defendants,"[27] S. Rep. No. 98-225 at 6-7, "demonstrably dangerous defendants," S. Rep. No. 97-317,

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erence to what it contends are carefully crafted and extensive procedural safeguards and because the procedural structure of the act underscores its fundamental incompatibility with basic principles of substantive due process and fundamental fairness. Because this particular case presents no procedurally based challenges to the act's constitutionality, this discussion is limited to the most glaring of the act's procedural shortcomings and is not intended as a catalogue of its failings.

[27] In light of the actual experience under the operation of the Bail Reform Act, one must question whether prosecutors and courts are ignoring the expressed assessment of Congress that detention is intended to reach only a small class of defendants or rather are responding affirmatively to what is perceived as the "real" intent of Congress. While the experience under the District of Columbia statute at issue in *Edwards* indicates that it was in fact sparingly employed, being invoked only approximately 60 times in the first five years of its existence, H.R.Rep. No. 1419, 94th Cong., 2d Sess. 4 (1976), the few available statistics regarding use of the Bail Reform Act indicate vast overutilization. Justice Department figures show that in the first ten months after the effective date of the Act, 2853 detention hearings were held, resulting in 1114 detentions on the basis of flight, 881 on the basis of dangerousness, and 705 on the basis of both. Figures reported to the Administrative Office of the U.S. Courts by United States Magistrates for a five month period in 1985 showed the holding of 4178 detention hearings, a figure which when annualized would suggest an annual rate equivalent to nearly 25% of all federal felony prosecutions. Riley, *Preventive Detention Use Grows — But Is It Fair?* 8 National Law Journal 1, 32 (March 24, 1986) (hereinafter referred to as Riley).

97th Cong., 2d Sess. 38 (1982), "a reasonably identifiable group of defendants who would pose a serious risk to the safety of others if released," due to a "strong possibility" that the defendant will commit additional crimes if released. S. Rep. No. 98-225 at 7, 10. The Senate Committee expressed its intention that the concept of dangerousness "be given a broader construction than merely harm involving physical violence," emphasizing also that continued drug trafficking would fall within the rubric of dangerousness to the community.

Imprecise as this language may be, the statute itself contains even less guidance. Detention may be invoked where a defendant is charged with a crime of violence, a crime for which the maximum penalty is life imprisonment or death, a controlled substances offense for which a maximum penalty of ten years or more is prescribed, or a felony committed after two prior convictions, 18 U.S.C. § 3142(f)(1)(A)-(D). The term "crime of violence" means "an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another" or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 3156(a)(4)(A), (B). However, while a charge of such a crime of violence suffices to permit a detention request, the legislative history indicates that the dangerousness which will authorize a detention order is not limited by even this relatively open-ended definition, and § 3142(g) instructs the judicial officer to consider "the nature and seriousness of the danger to any person or the community that would be posed by the person's release" without providing any guidance as to the nature of the danger sought to be avoided, either as to its qualitative or quantitative features.[28]

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[28] The grotesque distortions possible under such amorphous standards are exemplified by a pair of cases from the Middle District of Pennsylvania. In *United States* v. *Yeaple*, 605 F.Supp. 85 (M.D. Pa. 1985), the Court concluded that the federal offence of receiving material the production of which required a minor to engage in sexually explicit conduct was a crime of violence within the act because persons who create a demand for such materials by purchasing them indirectly cause minors to be drawn into this activity and bear some respon-

Section 3142 entrusts the liberty of free men to judicial officers who must necessarily "guess at [the statute's] meaning and differ as to its application . . . ." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Statutes which work a deprivation of liberty must provide fair notice of the standards which will be utilized in making the deprivation decision and must provide criteria sufficiently clear to preclude arbitrary or discriminatory enforcement.[29] *See Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972); *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). Section 3142 provides suffi-

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sibility for the violence done to them, "psychologically if not physically." *Id.* at 87. On this basis and the fact that the defendant had himself at some time in the past photographed minors engaging in sex, the defendant was ordered detained as a danger to the community. The National Law Journal reports that Mr. Yeaple was detained for three months, pled guilty and was immediately released on bail pending sentencing, and was subsequently placed on probation. Riley, *supra* note 27, at 33. Similarly, in *United States* v. *Cocco*, 604 F.Supp. 1060 (M.D.Pa. 1985), the court applied a dictionary definition of "violence" as "injury by or as if by distortion, infringement, or profanation" to conclude that the same statute was a crime of violence, corrupting of minds and morals, resulting in an order detaining a defendant described as a good father and husband, a successful and respected businessman with a good reputation in the community, and a substantial property owner with no prior criminal record. The same National Law Journal article reports a successful attempt to detain on a theory of "economic violence" in a credit card fraud case. Riley, *supra* note 27, at 33.

[29] That the statute also provides no curb upon prosecutorial arbitrariness is exemplified by the history which preceded the detention in this case. Respondent Salerno was indicted in February, 1985, for RICO conspiracy and substantive offenses, together with twenty-two other counts of extortion from businesses which affect interstate commerce, extortionate interference with labor unions, and loansharking. Alleged as part of the means of furthering the conspiracy were six murders and one conspiracy to murder, notwithstanding which the government agreed to Mr. Salerno's release on a $2 million secured bond with only the standard conditions. Nonetheless, in March, 1986, upon Salerno's arraignment on the indictment on which he is now held, which alleges bidrigging in the concrete construction industry, an extortionate transaction in the food manufacturing and distribution industry, exercise of control over unions, operation of an illegal gambling business, loansharking, and two conspiracies to murder, the government moved to detain the defendant pursuant to 18 U.S.C. § 3142(f)(1)(A), on the ground that he posed a danger to the community, notwithstanding the absence of any new information obtained since February, 1985, or of any indication of criminal wrongdoing by Salerno since that date. See Defendant Salerno's Supplemental Appendix in Support of His Motion for Conditions of Release, Vol. I(D) (Transcript of hearings before Walker, J.) (hereinafter referred to as Bail Appendix).

cient clarity neither "to guide the judge in its application" nor "the lawyer in defending one charged with its violation," *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952); it is an essentially empty standard, its content to be supplied on an *ad hoc* basis by the decisionmaker, who is free to decide how much dangerousness of what sort is too much to be averted through the imposition of stringent release conditions, and what particular aspects of community safety merit the draconian protection of the detention sanction.[30]

While the defendant does in most cases have notice of the charged past offense asserted to trigger the detention request, the statute fails to provide for any form of notice as to the future behavior on which detention is sought to be predicated. Notice of the adjudicatory basis upon which the government proposes to inflict a deprivation of liberty is an essential component of due process, the foundation upon which other procedural protections build and without which they are merely a cruel illusion. *See, e.g., Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (notice of alleged violations essential to process due before revocation of conditional parole liberty); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Wolff*

[30] Detention may be ordered only upon a finding that *no* conditions of release will reasonably assure the safety of the community, 18 U.S.C. § 3142(e). The range of available release conditions is set forth in § 3142(c)(1),(2)(A)-(N); that subsection includes a residuary clause allowing the decisionmaker to impose *any* other condition that he finds to be reasonably necessary to assure the safety of the community. As an example of just how restrictive those release conditions may be, Salerno here offered, in addition to secured bail in the amount of $2 million, to report personally to pretrial services whenever required and, in any event, to report telephonically before noon on a daily basis; to confine himself to his home in Rhinebeck, New York, with the exception of court appearances, consultation with his lawyer or his physician, and medically necessary walking in the vicinity of his home, notifying probation in advance of each meeting with physician or lawyer of his purpose and destination and telephoning again on his return; to submit himself to random visitation by probation; to have a pen register on all telephones at his residence; and to refrain from any association with named coconspirators as well as codefendants, except in the presence of his attorneys for purposes of defense preparation. See Bail Appendix, Vol. I(D) at 80-84; Vol. II(A) at 70.

While imposition of onerous and restrictive release conditions solely upon the ground of anticipated future dangerousness is not itself free from constitutional difficulty, the issue is not presented herein. Wherever the constitutional line may fall, the qualitative and quantitative leap from release on conditions to detention places the latter beyond the constitutional pale.

v. *McDonnell*, 418 U.S. 539 (1974) (loss of prison good time); *Goss* v. *Lopez*, 419 U.S. 565 (1975) (school suspension); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits).[31] Refutation of the proposition that one will, if given the opportunity to do so, intentionally make the morally culpable choice to commit a particular crime is, at best, an amorphous undertaking but when the breadth of the "charge" encompasses potentially the entire spectrum of conduct which might be found to jeopardize the safety of the community, the opportunity to be heard becomes virtually meaningless.

Compounding the vagueness of the statutory standard and the absence of any notice to defendant reasonably calculated to define the issues for hearing is the statutory exemption of these proceedings from the applicability of the rules of evidence, which has unanimously been interpreted to permit the

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[31] While the indictment may embody sufficient information to frame the issues for trial of the offenses charged, any notice it provides as to the asserted basis for detention is purely incidental. The nature and circumstances of the offense charged is only one factor among many to be considered in the detention calculus under 18 U.S.C. § 3142(g). While in some cases, the government will indeed contend that the future dangerousness feared is a continuation or repetition of the past behavior alleged in the indictment, this is no assistance to the defendant in preparing to oppose detention if he does not know that this is the basis for the government's contention. In a multi-count indictment, defendant knows neither which offense is relied upon as the triggering offense nor which charged offense — if any — the government will contend is likely to continue or be repeated absent detention. Moreover, the asserted future dangerousness may be of an entirely different nature than that which inheres in the offenses charged in the indictment. This is especially true in light of the statutory authorization for the use of hearsay in that it permits the detention request to be predicated on the indicted offense and the asserted dangerousness to be based upon a wide range of informant information regarding entirely unrelated and unproven past behaviors. In this case, for example, the most fact-specific allegations contained in the government's proffer, the Nardi-Green murders, which were particularly stressed by the government as a basis for detention have never been the basis of a criminal charge against Salerno. See Bail Appendix at A, B, D. Indeed, the act itself does not even require that the future dangerous behavior in fact involve the commission of crime. Without advance notice of at least the general category of dangerous conduct in which it is feared the defendant will engage, the defendant is significantly handicapped in preparing to refute the government's claim, whether through the proposal of release conditions specifically tailored to meet and negate the likelihood that the safety of the community would be threatened in the manner feared or through the presentation of affirmative evidence directed to the issue or through effective cross-examination of government witnesses.

government to meet its burden of proof in part or in full through hearsay. *See, e.g., United States* v. *Acevedo-Ramos*, 755 F.2d 203, 207 (1st Cir. 1985); *United States* v. *Hurtado*, 779 F.2d 1467, 1479-80 (11th Cir. 1985); *United States* v. *Winsor*, 785 F.2d 755, 756 (9th Cir. 1986); *United States* v. *Perry*, 788 F.2d 100, 106 (3d Cir. 1986); *United States* v. *Portes*, 786 F.2d 758, 764 (7th Cir. 1985). Characteristically, such hearsay involves the recitation by a government agent of information furnished by informants who are themselves heavily involved in criminal activity and whose interests thus lie in encouraging a favorable regard by the government or a recitation by one government agent recounting the investigatory procedures and observations of another, the reason for whose absence is neither questioned nor considered. At least one court has interpreted the act as relieving the government of the need to present *any* live witnesses whatsoever, allowing it to proceed entirely by proffer, *United States* v. *Martir*, 782 F.2d 1142, 1146 (2d Cir. 1986), which procedure was followed in this case, even though the act by its express terms only permits the defendant to proceed by proffer,[32] *see United States* v. *Suppa*, 799 F.2d 115, 118 (3d Cir. 1986). Thus while § 3142(f) confers the right to cross-examine those witnesses who do appear at the hearing, that protection is rendered largely nugatory by the concomitantly established authorization for the government to structure its presentation in such a manner as to insulate the declarant from cross-examination, thereby delivering up to the

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[32] At least one Court, on the other hand, has ignored the clear language of § 3142(f) that "[t]he person shall be afforded an opportunity . . . to present witnesses on his own behalf . . .", holding that the judicial officer, in the exercise of his discretion over the conduct of the hearing, may refuse to hear witnesses for the defendant and insist that counsel proceed by proffer. *United States* v. *Delker*, 757 F.2d 1390, 1396 (3d Cir. 1985).

Section 3142(f) also grants the defendant an opportunity to testify, an empty concession in light of Congress' rejection of a proposal to confer immunity upon a defendant's detention hearing testimony, one which poses the choice between the risk of self-incrimination and lengthy and onerous detention. *See United States* v. *Perry*, 788 F.2d 100, 115 (3d Cir. 1986). The right to proceed by proffer must accordingly be preserved for the defendant.

government the power to determine what, if any, confrontation shall be afforded the defendant.[33]

Confrontation has long been regarded as a fundamental component of the process due whenever a substantial and irremediable deprivation is at stake. *See, e.g., Specht* v. *Patterson*, 386 U.S. 605 (1967) (indeterminate sexually dangerous person commitment); *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270 (1940) (same); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (parole revocation); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *In re Gault*, 387 U.S. 1 (1967) (juvenile proceedings); *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969) (commission investigation); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits); *Greene* v. *McElroy*, 360 U.S. 474 (1959) (loss of security clearance); *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963) (bar admission). *Cf. Bridges* v. *Wixon*, 326 U.S. 135 (1945) (deportation).[34] This Court's discussion in *Greene* v. *McElroy, supra* at 496, is particularly pertinent:

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[33] Several courts have expressed some disquiet with this imbalance. The First Circuit in *United States* v. *Acevedo-Ramos*, 755 F.2d 203, 207 (1st Cir. 1985), recognized the difficulties inherent in reconciling the statutory right of cross-examination with the admissibility of hearsay; while acknowledging the strength of the arguments against use of hearsay in detention hearings, however, it chose rather to limit the hearsay on which the judicial officer might rely to investigatory descriptions of evidence, and similar hearsay, where the judicial officer reasonably concludes that the evidence, in the particular circumstances of the hearing, is reliable. To give greater effect to the right of cross-examination, the Court also empowered the judicial officer to insist upon the production of the underlying evidence or evidentiary source where its accuracy is in question. While recognizing its importance, the Third Circuit declined to address the hearsay/confrontation issue in *United States* v. *Perry*, 788 F.2d 100, 115 (3d Cir. 1986), because Perry had been afforded an opportunity to subpoena the agents whose extrajudicial declarations were reported but had failed to use it. *See also United States* v. *Accetturo*, 783 F.2d 382, 389 (3d Cir. 1986) (congressional authorization of hearsay does not represent determination that it is always appropriate). *But see United States* v. *Delker*, 757 F.2d 1390 (3d Cir. 1985) (permissible for judicial officer to refuse to allow defendant to subpoena hearsay declarants).

[34] While this Court concluded in *Gerstein* v. *Pugh*, 420 U.S. 103, 121 (1975), that confrontation and cross-examination were unnecessary to the initial probable cause determination required before a person could be held for further proceedings, its reasoning underscores the need for confrontation in the context of pretrial detention hearings:

> The use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also by the nature of

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends upon fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty, or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirement of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which pro-

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the determination itself. It does not require the fine resolution of conflicting evidence that a reasonable doubt *or even a preponderance standard* demands and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt . . . . This is not to say that confrontation and cross-examination might not enhance the reliability of probable cause determinations in some cases. In most cases, however, their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards assigned for trial must also be employed *in making the Fourth Amendment determination of probable cause* (emphasis added).

The consequences of a *Gerstein* probable cause finding are merely that the criminal process will continue through all the subsequent stages to its conclusion; that an incidental consequence of a probable cause determination may be the detention of the defendant on the ground that there is reasonable apprehension that he will not submit to the continuation of the process, a decision reached in a separate proceeding directed to qualitatively different issues, does not justify reading *Gerstein* as authorizing pretrial detention based upon a finding of probable cause, and, indeed, this Court was scrupulously careful to indicate that such was *not* its meaning. *See id.* at 114, 120. Moreover, the imposition of detention requires findings of fact by clear and convincing evidence, a much "fine[r] resolution of conflicting evidence" than even the preponderance standard which this Court found far more demanding than the Fourth Amendment probable cause standard. Finally, and most critically, we are not here concerned with a preliminary determination of Fourth Amendment probable cause but rather with the complete and total deprivation for months if not years of the liberty *per se* of a presumptively innocent person, a deprivation demanding of the highest level of procedural protection. *Cf. Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (probable cause insufficient basis for parole revocation, involving *conditional* liberty of person as to whom presumption of innocence extinguished by conviction).

> vides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny . . . .

Section 3142, while paying lip-service to the general requirement of confrontation and cross-examination, confers a right to so little of either as to be essentially meaningless as a mechanism of adversarial testing, a void which the defendant is powerless to fill in light of the statutory failure to provide for compulsory process.

An additional obstacle in the way of full exploration of the validity of the asserted factual bases for a finding of dangerousness is the conclusiveness accorded the indictment as a finding of probable cause sufficient to warrant further inquiry into the need for detention at the behest of the government, *see, e.g.*, *United States* v. *Hurtado*, 779 F.2d at 1477; *United States* v. *Contreras*, 776 F.2d 51, 54 (2d Cir. 1985); *United States* v. *Suppa*, 799 F.2d at 119; *United States* v. *Perry*, 788 F.2d at 112, an inquiry which is bootstrapped into its own answer by the triggering of the statutory presumptions where applicable. *See* 18 U.S.C. § 3142(e).[35] Missing in the process is any opportunity for the defendant to challenge the factual predicate for a finding of probable cause, perhaps the most important factor in preventing the pretrial detention of an innocent per-

[35] While this case did not involve application of the statutory presumptions of dangerousness, it is difficult to reconcile presumptive preventive detention with any notion of fundamental fairness or substantive due process, even if accorded the ameliorative construction of such cases as *United States* v. *Jessup*, 757 F.2d 378 (1st Cir. 1985). Treating the presumptions as a factor to be considered along with the § 3142(g) factors, to be given whatever weight the judicial officer deems appropriate, incorporates into the decisionmaking an improper general focus unrelated to the characteristics of the individual; i.e. that Congress has determined that persons possessing certain designated attributes should, in general, be deprived of their personal liberty pending trial. Moreover, given Congress' repeated protestations that the persons to whom detention should be applicable are readily and demonstrably identifiable, *e.g.*, S. Rep. No. 98-225 at 6-7, the artificial boost provided by the presumptions should be unnecessary to the process.

son; and, to the extent that the posited future dangerousness involves the anticipated continuation of the past conduct charged in the indictment, depriving him of the opportunity to refute the objective manifestation of the basis asserted.[36]

The extraordinary vagueness of the statutory standard, the acceptability of hearsay or even proffer as the basis for a detention order, and the concomitant limitation upon the right of confrontation and cross-examination all combine to rob of any meaning the statutory requirement of proof by clear and convincing evidence. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' . . . The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington* v. *Texas*, 441 U.S. 418, 423 (1979). Where, as here, proceedings employ imprecise substantive standards in a format which places the determination at the mercy of the subjective values of the judicial officer by granting the discretion to underweigh factors favorable to the defendant and to overweigh factors favorable to the government, the risk of error is magnified from the outset. *See Santosky* v. *Kramer*, 455 U.S. 745, 758 (1982). Further exacerbating the risk of error is the relaxation and even abandonment of the rules of evidence. *See Bridges* v. *Wixon*, 326 U.S. 135, 153-54 (1945) ("the more liberal the practice in admitting testimony, the more imperative the obligation to

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[36] The Ninth Circuit, in fact, considers the weight of the evidence the least important of the § 3142(g) factors. *E.g.*, *United States* v. *Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985). Significantly, the rationale underpinning this minimization of the scrutiny afforded the very offense charged which precipitated the detention request arises from an uneasy recognition that the greater the focus on the past offense charged, the more the statute assumes punitive rather than regulatory proportions. On the other hand, the Eleventh Circuit has acknowledged the unfairness inherent in an absolute preclusion, intimating that while the indictment may trigger both the hearing and the statutory presumptions, the analysis for purposes of the § 3142(g) weight of the evidence factor may necessarily be broader, including the right to cross-examine the government witnesses whose testimony led to the evidentiary finding of probable cause, *United States* v. *Hurtado*, 779 F.2d 1467, 1479-80 (11th Cir. 1985).

preserve the essential rules of evidence by which rights are asserted or defended"). The conjunction of the amorphous adjudicatory standards with the absence of evidentiary standards sends a message to the factfinder in direct opposition to that which is theoretically to be derived from the superimposition of an enhanced burden of proof, such that the clear and convincing standard does little or nothing to reduce the potential for an erroneous deprivation of liberty.

Further diluting the possibility that the clear and convincing standard will fulfill the function ascribed to it is the curious statutory distinction between the facts upon which the finding of dangerousness is based and the finding itself; Section 3142(f) provides that "[t]he facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety . . . of the community shall be supported by clear and convincing evidence"; § 3142(e) is silent as to the degree of relationship which these facts must bear to the ultimate finding that "no condition or combination of conditions will *reasonably* assure . . . the safety of . . . the community" (emphasis added), a formulation which suggests a lower evidentiary threshold. Section 3142 does not by its terms require that *future* dangerousness be found to a clear and convincing level of certainty but only the underlying historical facts which are said to give rise to the conclusion.[37]

In addition, there is no requirement that the judicial officer find by clear and convincing evidence that the defendant committed the offense asserted to trigger the applicability of § 3142(f), the weight of the evidence against the defendant being merely one factor among many, to be accorded whatever significance the judicial officer deems appropriate under the

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[37] The incongruity of allowing a clear and convincing standard to be met by hearsay or proffer is underscored by the fact that rights so substantial as to demand the protection of an enhanced burden of proof have generally been thought also to demand the protections afforded by the rules of evidence. *See, e.g., Santosky* v. *Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Addington* v. *Texas*, 441 U.S. 418 (1979) (civil commitment).

circumstances.[38] This Court has frequently noted the requirement that deprivation of liberty be grounded in past misconduct as well as future dangerousness. *See, e.g., Jones* v. *United States,* 463 U.S. 354, 361, 364 n.12 (1983); *Specht* v. *Patterson,* 386 U.S. 605, 608 (1967); *Minnesota ex rel. Pearson* v. *Probate Court,* 309 U.S. 270, 274 (1940); *Allen* v. *Illinois,* ___ U.S. ___, 106 S.Ct. 2988, 2993 (1986). *Cf. Addington* v. *Texas,* 441 U.S. 418, 429 (1979) (requiring clear and convincing evidence of mental illness *and* dangerousness). *But see Jackson* v. *Indiana,* 406 U.S. 715, 728 (1972) (no affirmative proof accused had committed criminal act; pending charges did not supply such proof in context of civil commitment statute).[39] The more attenuated the relationship between the imposition of pretrial detention and the past conduct which gave rise to its invocation, the more nearly the Bail Reform Act approximates a pure preventive detention scheme.

Finally, the deprivation at issue here is indistinguishable in terms of the consequences to the individual and the attendant stigmatization from that imposed by the criminal sentencing process; indeed, it is far more onerous than criminal sanctions such as fine, probation, or very brief periods of incarceration which must nonetheless be supported by a finding of guilt beyond a reasonable doubt:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake an interest of immense importance both because of the

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[38] The statute at issue in *United States* v. *Edwards,* 430 A.2d 1321 (D.C. App. 1981), required that the government demonstrate a "substantial probability" that the defendant had committed the offense charged. The omission of any such requirement from the Bail Reform Act was deliberate. *See* S. Rep. No. 98-225 at 18.

[39] The Court held in *Jackson* that the pendency of criminal charges could not justify commitment on different terms or by different procedures than those required for regular civil commitment once the justification for commitment as incompetent to stand trial had ended, 406 U.S. at 738, following *Baxstrom* v. *Herold,* 383 U.S. 107, 111 (1966), which had struck down a distinction for purposes of civil commitment between persons nearing the end of their criminal sentences and all other persons.

> possibility he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt . . . . There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value — as a criminal defendant his liberty — this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder . . . of his guilt beyond a reasonable doubt.

In re Winship, 397 U.S. at 363-64. *No* less is required in the pretrial detention context for the ultimate conclusion that the defendant is so dangerous that he must be stripped of his liberty prior to an adjudication of guilt.[40]

The procedures provided in § 3142 demonstrate not a careful balancing of individual rights against governmental interests but rather a constitutionally impermissible weighting of the scales in favor of detention. The established analytical framework for determining the parameters of the procedural protections required by the Due Process Clause was set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), and requires that the Court consider:

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[40] While this Court held in *Addington* v. *Texas*, 441 U.S. 418, 429 (1979), that the constitution required the application of no less than a clear and convincing standard of proof to civil commitment cases, the liberty at stake therein was of one who was, by virtue of his mental illness, neither wholly at liberty nor free of stigma. Furthermore, the issue to be adjudicated was whether or not the individual was deprived by his illness of the ability to control his behavior such that he thereby posed a danger to himself or the community. In contrast, the Bail Reform Act is not cast in terms of a strict either-or proposition; the question is not whether the defendant is "dangerous" but rather whether he is *so* "dangerous" that even the most restrictive conditions of release, which may be tantamount to house arrest under watchful government surveillance, will not suffice. Moreover, the impact of an erroneous initial determination in a civil commitment case is somewhat ameliorated by liberal provision for the patient to obtain release if he is no longer dangerous, *see, e.g., Jackson* v. *Indiana*, 406 U.S. 715 (1972); the pretrial detainee once incarcerated is in for the duration, subject only to limited appellate review.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The individual interest at stake is of the highest and most fundamental and requires no further elaboration to demonstrate the necessity of the most stringent of procedural protections. "Given the grave invasion of the most fundamental of all personal liberties that occurs when preventive detention is ordered and the high risk of an erroneous judgment as to the highly speculative determination of future dangerousness, the procedural due process mode of analysis suggested by *Mathews* seems to require that the procedural safeguards should approach those used in the far less speculative enterprise of determining guilt of past misconduct." *United States* v. *Perry*, 788 F.2d at 114.

The government interest at stake presumably does not extend to the detention of individuals who would not if released engage in criminal behavior. *See, e.g., Santosky* v. *Kramer*, 455 U.S. at 764; *Addington* v. *Texas*, 441 U.S. at 426. Moreover, the expressed congressional certainty that it was dealing only with a small group of readily identifiable individuals would suggest that procedures more scrupulous of individual rights would not greatly undermine the act's avowed purpose.[41] The funda-

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[41] The government's assertion that the procedural protections afforded under § 3142 are *ipso facto* adequate because greater than those accorded juveniles under the statutory scheme at issue in *Schall* v. *Martin*, *supra*, is not only not necessarily true but also ignores the vastly greater liberty at stake in the case of presumptively innocent competent adults and the far more severe deprivation involved, a difference between seventeen days and months if not a year or more. The degree of potential deprivation and its possible length are also significant factors to be considered. *Mathews* v. *Eldridge*, 424 U.S. at 341.

An additional purported justification for the casualness of the procedures sometimes advanced by the government is the requirement of § 3142(f) that the detention hearing be held immediately upon the defendant's first appearance

mental importance of the individual rights affected demands that any risk of error be borne by society rather than by the potential detainee. *Compare In re Winship*, 397 U.S. at 363-64, *with Addington* v. *Texas*, 441 U.S. at 428-29.

While this Court has indicated that there is "nothing inherently unattainable about a prediction of future criminal conduct," *Schall* v. *Martin*, 467 U.S. at 278, it is nonetheless an undertaking fraught with uncertainty, *see Barefoot* v. *Estelle*, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting), requiring full adversarial testing to "sort out the reliable from the unreliable evidence," *Barefoot* v. *Estelle*, 463 U.S. at 901. *See also Jurek* v. *Texas*, 428 U.S. 262 (1976). The government contends that the defendant is under the statute "entitled to a full adversary hearing on the detention question," Brief for Petitioner at 37; in light of the foregoing discussion, such a suggestion is preposterous. What is true, however, is that the fundamental fairness mandated by the Due Process Clause would require, at a minimum, a readily ascertainable adjudicatory standard, notice to the defendant of the grounds on which the government asserts he poses an unacceptable risk of danger to the community, an opportunity to contest the factual predicate underlying the crimes charged, the application of the rules of evidence, full rights of confrontation, cross-examination and compulsory process, and proof of future dangerousness beyond a reasonable doubt, predicated upon a finding by clear and convincing evidence that the accused committed the offenses charged.

This is not, of course, to suggest that a preventive detention statute incorporating these procedural protections would pass constitutional muster.

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before a judicial officer, subject to the possibility of a three day continuance at the request of the government or up to five days, or more if good cause is shown, at the request of the defendant. However, in the vast majority of cases indictment precedes arrest, such that it is within the power of the government to effect the arrest after it has largely marshalled its evidence and is ready to litigate a detention request. In most of the remaining cases, for example, where the defendant is arrested "at the scene," the arrest will have been preceded by surveillance and information gathering regarding the persons involved, such that persons with first hand knowledge will generally be available to testify.

> Even if a statute provided that a person could be incarcerated for dangerousness only after a jury had been persuaded that his dangerousness had been established beyond a reasonable doubt at a trial surrounded with all of the procedural guarantees applicable to determinations of guilt, the statute could not be upheld, no matter how brief the period of detention. It would be constitutionally infirm, not for lack of procedural due process, but because the total deprivation of liberty as a means of preventing future crime exceeds the substantive limitations of the Due Process Clause.

United States v. *Salerno*, 794 F.2d at 72, *quoting United States* v. *Melendez-Carrion*, 790 F.2d at 1001. Rather, the absence of such protections, indeed, of most of the protections generally deemed essential to the prevention of erroneous deprivations of fundamental liberties, compels the conclusion that the Bail Reform Act of 1984 legislates a deprivation of liberty wholly outside the bounds of the substantive limitations imposed by the Due Process Clause.

The government is not, however, left without recourse in pursuit of its interest in the prevention of future crime. The Bail Reform Act and other provisions of the Comprehensive Crime Control Act of 1984 provide the government with significantly enhanced powers to deal with new crimes committed by defendants while on pretrial release. *E.g.*, 18 U.S.C. § 3062 (authorizing arrest without warrant of person who agent has probable cause to believe has violated certain release conditions in his presence); 18 U.S.C. § 3147 (authorizing imposition of additional penalty of up to ten years consecutive to penalty for offense where crime committed while on release); 18 U.S.C. § 3148 (authorization for issuance of arrest warrant for violation of release condition; violation of release condition punishable as contempt). The availability of these procedures strikes the only regulatory balance possible in this context; through these processes the government is empowered to act when the defendant violates a release condition to which he has agreed to submit himself and which might reasonably be

viewed as a precursor to future crime, for example, association with known confederates or presence at a known locus of criminal activity, which have been forbidden to him by the conditions of his release.[42] Through the mechanism of imposition of sanctions for violation of a release condition, including incarceration for contempt, the defendant may be deprived of his liberty, not on the impermissible basis that he is believed to present an unacceptable risk of future dangerousness to the community but rather on the basis that he has elected, of his own free will, to flaunt the explicit terms of a known requirement. While such deference to basic human dignity and the right of self-determination may not perfectly serve the government's interest, where that interest conflicts with the fundamental right to liberty, the higher values embodied in the Due Process Clause must necessarily take precedence.

Conclusion.

The judgment of the Second Circuit Court of Appeals must be affirmed.

Respectfully submitted,

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[42] Such violations as these are among those for which federal agents are authorized under 18 U.S.C. § 3062 to arrest without a warrant if committed in the presence of the officer. Accordingly, if there is real reason to fear that the defendant will commit a serious crime while on pretrial release, the structuring of release conditions specifically tailored to minimize the possibility of its occurrence accompanied by surveillance to monitor the defendant's compliance with those conditions will permit the government to intervene in the event of a material breach without awaiting the actual happening of the feared event.

(12)

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No. 86-87

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO AND VINCENT CAFARO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-87

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO AND VINCENT CAFARO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent Salerno offers three arguments in support of the court of appeals' decision.[1] First, he con-

[1] Respondent Cafaro has not filed a separate brief. Since the petition was granted, there have been several developments pertinent to this case. On November 19, 1986, Salerno was convicted in an unrelated extortion case and is presently awaiting sentencing. The district court in that case has not yet committed Salerno to the custody of the Attorney General. Thus, Salerno remains under pretrial detention in the present case, and the validity of that detention continues to present a live controversy. On October 8, 1986, Cafaro was temporarily released for medical treatment. Because he is still

tends that the pretrial detention provisions of the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) 3141 *et seq.*, impermissibly inflict punishment prior to an adjudication of guilt (Resp. Br. 5-15). Second, he argues that the government may never, under any circumstances, curtail the pretrial liberty of a criminal defendant to prevent him from committing crimes prior to trial (*id.* at 15-33). Third, he asserts that even if the government could detain a potentially dangerous criminal defendant prior to trial, the Bail Reform Act is so defective procedurally that it must be struck down in its entirety (*id.* at 33-50).

1. The pretrial detention provisions of the Bail Reform Act do not result in an unconstitutional form of punishment. This Court has repeatedly recognized that the government may detain a criminal defendant for non-punitive regulatory purposes. See, *e.g.*, *Schall* v. *Martin*, 467 U.S. 253, 269 (1984) ("pretrial detention may serve legitimate regulatory purposes"); *Bell* v. *Wolfish*, 441 U.S. 520, 539 (1979) ("if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment' " (footnote omitted)); *Moyer* v. *Peabody*, 212 U.S. 78, 84-85 (1909) ("Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power."); *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896) ("Detention is a usual feature of every case of arrest on a criminal charge,

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subject to the pretrial detention order, Cafaro's case also continues to present a live controversy. The government recently returned a superseding indictment against Salerno and Cafaro in the present case, and the trial is presently scheduled to begin on March 30, 1987.

even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense."). Notably, the court of appeals in this case refused to base its decision on a finding that the Bail Reform Act is punitive. The court concluded instead that "the Due Process Clause prohibits pretrial detention on the ground of danger to the community as a regulatory measure" (Pet. App. 14a).[2]

As Salerno recognizes, the crucial question is " 'whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.' " *Schall*, 467 U.S. at 269 (quoting *Wolfish*, 441 U.S. at

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[2] Furthermore, Judge Newman noted in *United States* v. *Melendez-Carrion*, 790 F.2d 984, 999-1000 (2d Cir. 1986), that the legislative history of the Bail Reform Act makes it clear that Congress intended pretrial detention to serve a regulatory rather than a punitive purpose. See also *id.* at 1007 (Feinberg, J., concurring); *id.* at 1014 (Timbers, J., dissenting). Every other court that has addressed the issue has concluded that the pretrial detention provisions are regulatory and not punitive. See *United States* v. *Zannino*, 798 F.2d 544, 547-548 (1st Cir. 1986); *United States* v. *Perry*, 788 F.2d 100, 109 (3d Cir. 1986), cert. denied, No. 86-5172 (Oct. 6, 1986); *United States* v. *Portes*, 786 F.2d 758, 767 (7th Cir. 1985); *United States* v. *Maull*, 773 F.2d 1479, 1485 (8th Cir. 1985) (en banc); *United States* v. *Jessup*, 757 F.2d 378, 385 (1st Cir. 1985); *United States* v. *Freitas*, 602 F. Supp. 1283, 1290-1291 (N.D. Cal. 1985); *United States* v. *Kouyoumdjian*, 601 F. Supp. 1506, 1511 (C.D. Cal. 1985); *United States* v. *Hazzard*, 598 F. Supp. 1442, 1451 (N.D. Ill. 1984). The "punishment" argument was raised by the defendants and implicitly rejected in *United States* v. *Simpkins*, 801 F.2d 520 (D.C. Cir. 1986) (Table) (per curiam; opinion to be filed), and in *United States* v. *Walker*, 805 F.2d 1042 (9th Cir. 1986) (Table) (per curiam; opinion to be filed). See also *United States* v. *Edwards*, 430 A.2d 1321, 1332-1333 (D.C. App. 1980) (en banc), cert. denied, 455 U.S. 1022 (1982).

538). Salerno admits (Resp. Br. 5) that the legislative history of the Bail Reform Act clearly shows that Congress intended the statute to serve a nonpunitive, regulatory purpose. See S. Rep. 98-225, 98th Cong., 1st Sess. 3-25 (1983); 130 Cong. Rec. S938-S947 (daily ed. Feb. 3, 1984).[3] He nevertheless suggests (Resp. Br. 7) that closer inspection reveals "the undeniable transcendence of the punitive substance over the regulatory form."

Salerno proposes (Resp. Br. 8-9) what amounts to a faulty syllogism. He notes that a criminal conviction results in punishment, and that the typical punishment—imprisonment—prevents the convicted defendant from committing future crimes; he then concludes that any attempt to detain a person to prevent him from committing future crimes must therefore be punishment. This argument suffers from at least three basic flaws.

First, as a matter of logic, the fact that a criminal sentence, imposed for the purpose of punishment, results in incapacitation of the convicted defendant does not mean that any attempt to incapacitate a dangerous defendant must be punishment. A court can-

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[3] Salerno suggests that "the true measure of the punitive purpose of § 3142" is found in the floor debates (Resp. Br. 5 n.1). He notes Senator Mitchell's criticism of Senator Thurmond's supposed rhetorical question " 'Do you want to turn a lot of people loose who are guilty?' " (130 Cong. Rec. S944 (daily ed. Feb. 3, 1984)). That quotation is doubly misleading. First, Senator Mitchell himself agreed that preventive detention serves a legitimate regulatory purpose (*id.* at S939) and joined 83 other senators in voting in favor of the Bail Reform Act (*id.* at S947). Second, Senator Mitchell misquoted Senator Thurmond. Senator Thurmond actually asked, "what do we want to do, turn a dangerous man or a potential fugitive loose?" (*id.* at S941).

not ascribe a punitive purpose to a particular restraint simply because a similar restraint is also incident to criminal punishment. See *Wolfish*, 441 U.S. at 538-539. The proper question, instead, is whether a court can reasonably find a valid regulatory purpose that supports the restraint (*id.* at 539).

Second, as a matter of experience, the measures imposed after a conviction of crime need not be (and rarely are) imposed exclusively for punitive purposes. While criminal sentences are usually designed to advance the basic punitive objectives of retribution and deterrence (see, *e.g.*, *Wolfish*, 441 U.S. at 539 n.20), they frequently also serve purposes that are plainly regulatory, such as providing an offender with basic health care and literacy skills or preventing a convicted defendant from fleeing or committing further crimes. See Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401 (1958). Thus, it is hardly surprising that pretrial detention, imposed for regulatory purposes, may share certain of the regulatory features of a criminal sentence.

Third, as a matter of precedent, Salerno's basic argument is inconsistent with *Schall*, which treated New York's pretrial detention statute as regulatory, despite its similarity to a criminal sanction. See 467 U.S. at 300-302 (Marshall, J., dissenting). If pretrial detention to prevent crime must necessarily be equated with punishment, then New York's statute could not have survived this Court's scrutiny.

Salerno attempts to distinguish this case from *Schall* on various grounds, none of which is convincing. In the present case, as in *Schall*, "[t]here is no indication in the statute itself that the preventive detention is used or intended as a punishment"

(467 U.S. at 269). In this regard, *Schall* noted that "the detention is strictly limited in time" (*ibid.*). The New York statute required a probable cause hearing within three days after the juvenile's initial appearance, and it limited subsequent detention to an additional 14 days. The Bail Reform Act also contains limits on the length of detention. It generally requires a detention hearing within five days after the defendant's initial appearance (18 U.S.C. (Supp. II) 3142(f)), and it limits subsequent detention according to the restrictions imposed by the Speedy Trial Act, 18 U.S.C. (& Supp. II) 3161 *et seq.* See S. Rep. 98-225, 98th Cong., 1st Sess. 22 n.63 (1983). Contrary to Salerno's suggestion, one cannot ascribe a punitive intent to Congress's choice to utilize more flexible, but still restrictive, time limitations.[4]

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[4] The legislative history indicates that Congress adopted the Speedy Trial Act time limits not as "a clear manifestation of punitive intent" (Resp. Br. 9-10 n.6) but rather to provide a measure of flexibility in response to the difficulties in bringing large-scale drug trafficking cases and other complex cases to trial within 60 days. See 130 Cong. Rec. S941-S945 (daily ed. Feb. 3, 1984). Salerno argues (Resp. Br. 9-10 n.6) that the time limits imposed by the Speedy Trial Act are largely illusory, selectively citing exceptional cases that have resulted in unusually long delays. Those unrepresentative cases cannot support a facial challenge to the constitutionality of the Bail Reform Act. Indeed, the courts have uniformly recognized that a defendant may *not* be detained indefinitely, and that constitutional challenges to the length of pretrial detention in particular cases must be determined in light of the facts of each individual case. See, *e.g.*, Pet. App. 30a-32a (Feinberg, J., dissenting); *United States* v. *Zannino*, 798 F.2d 544, 548 (1st Cir. 1986) (per curiam); *United States* v. *Acceturo*, 783 F.2d 382, 387-388 (3d Cir. 1986); *United States* v. *Portes*, 786 F.2d 758, 768 & n.14 (7th Cir. 1986). Salerno

Schall also observed that the conditions of confinement imposed by the New York statute "appear to reflect the regulatory purposes relied upon by the State" (467 U.S. at 270), noting that the juvenile detainee was generally kept apart from adult criminals (*ibid.*). The Bail Reform Act contains an analogous limitation, requiring that pretrial detainees be placed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal" (18 U.S.C. (Supp. II) 3142(i)(2)). Contrary to Salerno's assertions, one cannot infer a punitive intent from the mere fact that there may be qualitative differences between New York's juvenile facilities and the detention facilities in which Salerno is being held.[5]

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also cites a statistic (Resp. Br. 9-10 n.6) that 307 defendants were detained for more than 151 days in 1985. That figure (even if it is assumed to be numerically correct) apparently includes both defendants who were ordered detained and those who were granted conditional release but were unable to meet the specified bail conditions. Among those detained by order, only a fraction would have been detained on the ground of dangerousness. (The Justice Department's informal statistics for fiscal year 1986 indicate that roughly 47% of Bail Reform Act detention orders are based on risk of flight alone, 38% are based on both risk of flight and danger to the community, and only 15% are based solely on danger to the community.) Thus, the number of persons detained solely on the grounds of dangerousness for more than 151 days appears to be quite small.

[5] There is no support in the record for Salerno's contentions that pretrial detainees are generally subjected to "onerous" conditions of confinement (Resp. Br. 11) or that "the segregation of pretrial detainees from sentenced prisoners has generally led to harsher rather than more benign conditions of confinement" (*id.* at 11 n.7). The fact that pretrial detention interferes with the detainee's "understandable desire to live as comfortably as possible and with as little restraint as pos-

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The regulatory purpose of the Bail Reform Act is also supported by factors not present in the New York statute at issue in *Schall*. The Act provides that pretrial detention may be employed only as a last resort, when "the judicial officer finds that no condition or combination of conditions will reasonably assure * * * the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)). In addition, the Act specifically requires the judicial officer to consider the personal characteristics of the defendant and the nature and seriousness of the danger that would be posed by his release (18 U.S.C. (Supp. II) 3142(g)). The Act thus expressly instructs courts to apply the pretrial detention provisions in a non-punitive manner, which provides additional checks against its possible application for punitive purposes. In sum, both the purposes of the Bail Reform Act and its specific provisions refute Salerno's assertion that the pretrial detention provisions are punitive in nature and therefore cannot be applied in the absence of a criminal conviction.

2. Salerno's second argument is that due process forbids the regulatory detention of competent adult citizens under any circumstances (Resp. Br. 15-33). Salerno contends that the Due Process Clause creates an insurmountable "constitutional wall" (*id.* at 16) that forbids the government from detaining potentially dangerous persons except as a consequence of criminal conviction. To permit the detention of competent adults other than as a consequence of criminal

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sible during confinement does not convert the conditions or restrictions of detention into 'punishment.'" *Wolfish*, 441 U.S. at 537.

conviction, he claims, "would eradicate a heretofore sacrosanct line" (*id.* at 4; see also *id.* at 14).

Although Salerno repeatedly invokes the constitutional rights of "competent adults" and "competent adult citizens," [6] the Due Process Clause does not accord special privileges to that class, while denying those privileges to the mentally or emotionally impaired, minors, and aliens.[7] The reason that Salerno has focused on the class of competent adult citizens is readily apparent. This Court has already decided that the Constitution does not prohibit the government from employing regulatory detention in the case of the mentally impaired (*Addington* v. *Texas*, 441 U.S. 418, 426 (1979)), juveniles (*Schall* v. *Martin*, 467 U.S. at 281), and aliens (*Wong Wing* v. *United States*, 163 U.S. at 235). Salerno's identification of a special class of "competent adult citizens" is simply an attempt to avoid the force of those precedents.

Salerno can point to no decision of this Court declaring that competent adult citizens enjoy absolute freedom from regulatory detention. And he is forced to concede (Resp. Br. 22, 27-31) that this Court already has recognized that competent adult citizens may be detained for regulatory purposes in a variety of special circumstances, such as during times of war (*Korematsu* v. *United States*, 323 U.S. 214 (1944))

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[6] Resp. Br. 1, 2, 3, 4, 5, 8 n.4, 11, 14 & n.10, 15, 25, 26, 28, 32, 33, 34.

[7] Notably, this Court's decisions have shown special concern for according equal protection to children (*e.g.*, *Plyler* v. *Doe*, 457 U.S. 202 (1982)), the mentally and emotionally handicapped (*e.g.*, *City of Cleburne* v. *Cleburne Living Center, Inc.*, No. 84-468 (July 1, 1985)), and aliens (*e.g.*, *Takahashi* v. *Fish and Game Comm'n*, 334 U.S. 410 (1948)).

or civil insurrection (*Moyer* v. *Peabody*, 212 U.S. 78), to protect the public from contagious disease (*Compagnie Francaise de Navigation a Vapeur* v. *Louisiana State Board of Health*, 186 U.S. 380, 387 (1902)), to complete proceedings incident to arrest (*Gerstein* v. *Pugh*, 420 U.S. 103, 113-114 (1975)), to assure a defendant's appearance at trial (*Bell* v. *Wolfish*, 441 U.S. at 534), and to protect witnesses from harm (*Carbo* v. *United States*, 82 S. Ct. 662 (1962) (Douglas, Circuit Justice)). Salerno attempts (Resp. Br. 23-32) to distinguish those cases on their facts. But the labored nature of the effort to gerrymander the case law to accord with his "sacrosanct line" provides compelling evidence that no such line exists.

Salerno's rejection of any balancing of governmental and individual interests is incompatible with the concept of substantive due process. The commands of due process reflect " 'the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.' " *Moore* v. *City of East Cleveland*, 431 U.S. 494, 501 (1977) (plurality opinion) (quoting *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

The Court's approach to substantive due process review of legislative action has been characterized both by restraint and by the rejection of broad constitutional absolutes of the sort that Salerno has proposed. The limits on substantive due process "come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.' " *Moore*, 431 U.S. at 503 (footnote omitted) (quoting *Griswold* v. *Connecticut*, 381 U.S. 479, 501

(1965) (Harlan, J., concurring in judgment)); see, *e.g.*, *Ingraham* v. *Wright*, 430 U.S. 651, 675 (1977); *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 162-163 (1951) (Frankfurter, J., concurring); *Lochner* v. *New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). " 'No formula could serve as a substitute, in this area, for judgment and restraint.' " *Moore*, 431 U.S. at 501 (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)). See, *e.g.*, *Bowers* v. *Hardwick*, No. 85-140 (June 30, 1986), slip op. 8; *Regents of the University of Michigan* v. *Ewing*, No. 84-1273 (Dec. 12, 1985), slip op. 1 (Powell, J., concurring); cf. *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 222 (1953) (Jackson, J., dissenting).[8]

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[8] Salerno maintains (Resp. Br. 17-19) that pretrial detention based on perceived dangerousness is foreign to American jurisprudence and therefore unconstitutional. His reading of history and his conclusion, however, are both mistaken. As we explained in our opening brief (Br. 28 n.14), both federal and state courts have traditionally been empowered to restrain dangerous persons through the common law remedy of "holding to security of the peace." See 4 W. Blackstone, *Commentaries* *248-252. Moreover, although the English authorities do not shed much light on the matter, there is some indication that by the 18th century, bail was being denied in criminal cases in part for reasons of public safety. See A. Highmore, *Digest of the Doctrine of Bail* vii (1783) (bail may be denied so that "the safety of the people should be preserved against the lawless depredations of attrocious offenders"). And as we noted in our opening brief (Br. 30-33), before the 1984 Act the federal courts regularly detained dangerous persons through the sub rosa practice of setting unattainably high financial conditions for release. See, *e.g.*, H.R. Rep. 91-907, 91st Cong., 2d Sess. 83-85 (1970). Thus, it is simply inaccurate to state that pretrial detention is foreign to American law. In any event, pretrial detention certainly is not "a

A broad, absolutist approach of the sort Salerno proposes is no more appropriate when the focus of the substantive due process challenge is a restraint on liberty. Due process recognizes the "necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein* v. *Pugh*, 420 U.S. at 112. The inquiry in this case is therefore not amenable to categorical or rhetorical answers of the sort that Salerno offers. Instead, it requires a determination whether the limited imposition on individual liberty resulting from the Bail Reform Act can be justified by the importance of the objective of community safety and the adequacy of the Act's procedural safeguards.[9]

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grotesque anomaly unknown in civilized societies" (Resp. Br. 13). Many of the world's most respected democracies, including France, Great Britain, and West Germany, employ pretrial detention to prevent defendants from committing crimes while awaiting trial. Note, *Preventive Detention: A Comparison of European and United States Measures*, 4 N.Y.U.J. Int'l L. & Pol. 289, 292-303 (1971). The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, specifically authorizes pretrial detention of an individual "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so" (art. 5(c), 213 U.N.T.S. 226).

[9] At one point Salerno seems to concede his own per se argument. He notes (Resp. Br. 49-50) that concern for community safety has led to a requirement that a defendant give assurance of his good behavior; if the defendant violates the terms of that assurance, he can then be restrained. But unless that restraint requires a full dress criminal trial and conviction, Salerno has, in effect, acknowledged the legitimacy of pretrial detention at least for defendants who have violated the terms of their conditional release.

Salerno suggests (Resp. Br. 16-17, 32-33) that judicial approval of the pretrial detention provisions at issue here will supplant familiar elements of the present criminal justice system. That contention rests upon a mischaracterization of the Bail Reform Act. Under the Act, the criminal trial remains the "main event" (*Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977) in the criminal justice system. The Act's pretrial detention provisions are narrowly tailored to address a specific problem, ancillary to and arising from the event: the documented practice of criminal defendants committing crimes while awaiting trial. Detention to prevent the commission of crimes pending trial—like detention to assure the defendant's appearance at trial and the safety of witnesses—is an adjunct of the criminal adjudication that experience has proved is sometimes necessary to secure the ultimate goals of justice. The criminal charges and their due resolution are the initiating and sustaining cause of the detention.[10]

A statute containing sweeping provisions for incarcerating persons thought to be "dangerous"—without

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[10] This explains why Salerno's discussion of the constitutional difficulties in detaining a dangerous person after acquittal on a technicality or after completion of a sentence is beside the point. In neither case would detention be ancillary to a pending criminal prosecution. Notably, no congressman, to our knowledge, has ever proposed a general regime permitting preventive detention in the absence of pending criminal charges. We find it highly improbable that Congress would ever attempt such genuinely troubling legislation. Legislation authorizing the preventive detention of an individual in the absence of pending criminal charges might conceivably be permissible (see, *e.g.*, *Korematsu* v. *United States*, *supra*; *Moyer* v. *Peabody*, *supra*), but it would require a most extraordinary justification.

any resort to the criminal justice system—would obviously raise serious constitutional difficulties. We are confident that Congress would not enact, and this Court would not tolerate, a statutory scheme that displaced the criminal justice system and replaced it with a "dangerousness" system in which any person found to be dangerous, after a civil or administrative proceeding, could be imprisoned. But a scheme embodying such a conception does not even remotely correspond to the conception or effect of the Bail Reform Act. The provisions of the Act in issue here are ancillary to the criminal justice system, not a device for displacing it.

Because of its limited ancillary role in the criminal justice system, the Bail Reform Act does not, as Salerno suggests, threaten the "right of every competent adult citizen of this country to liberty" (Resp. Br. 4). Beyond the limitation inherent in permitting detention only in the course of an ongoing criminal proceeding, Congress carefully restricted the pretrial detention provisions to a narrow class of particularly dangerous criminal defendants who satisfy specific statutory criteria. See S. Rep. 98-225, 98th Cong., 1st Sess. 6 (1983). The pretrial detention provisions are applicable only to defendants who are charged with (a) a crime of violence; (b) an offense that may result in a sentence of life imprisonment or death; (c) certain serious drug-related crimes; or (d) a felony, if the defendant has previously been convicted of two or more serious crimes. 18 U.S.C. (Supp. II) 3142(f)(1). In addition, the government must demonstrate, through clear and convincing evidence (18 U.S.C. (Supp. II) 3141(f)), that the defendant is so dangerous that "no condition or combination of conditions will reasonably assure * * *

the safety of any other person and the community" (18 U.S.C. (Supp. II) 3142(e)).[11]

Salerno concedes (Resp. Br. 21-22) that the government may detain a criminal defendant (even a competent adult citizen) to prevent him from fleeing or tampering with witnesses. He suggests, however, that detention is permissible only where "the judicial process itself will be thwarted" (Resp. Br. 22). As we note in our opening brief (Br. 24-25), this distinction is both artificial and unreasonable. Salerno fails to explain, except by rhetorical ipse dixit (Resp. Br. 8 n.4, 14, 15, 29, 32-33) why regulatory detention may be employed to protect the judicial process, but not, under any circumstances, to protect the people whom the process serves.

The Bail Reform Act breaks new ground only in its attempt to deal with the problem of pretrial crime candidly and responsibly. Pretrial detention to prevent crime, like detention to assure presence at trial and to prevent tampering with witnesses, is a necessary and reasonable response to the inevitable delays that accompany a fair adjudication of criminal charges. If it were possible to try a criminal case immediately upon the filing of charges, or if it were possible to keep account of and control a defendant pending trial, there would be no need for pretrial detention. But as crime has increased, both in volume and seriousness, as society has become more mobile, anonymous, and vulnerable to criminal depredations, and as criminal procedure has grown more complex,

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[11] Respondent suggests (Br. 35 n.28) that the courts, in applying the Bail Reform Act's statutory criteria, have engaged in "grotesque distortions" of the statute's limiting language. That claim, even if it were true, could not support an attack on the facial validity of the statute.

that ideal has become increasingly unattainable. Practical realities accordingly require pretrial detention in certain limited circumstances, including those cases where clear and convincing evidence shows that pretrial release would pose a grievous threat to the public safety and the government is moving with dispatch toward a final determination of the criminal charges.[12]

At bottom, Salerno fails to confront the grim realities of pretrial crime. He apparently believes, like the court of appeals (Pet. App. 20a), that society must release criminal defendants, no matter how grave the threat to community safety, and must simply accept the resulting risks. He gives no answer to Judge Feinberg's all too real hypothetical case (Pet. App. 28a) of an avowed (and perhaps suicidal) terrorist whose will is bent upon public mayhem, except to assure us that release conditions and surveillance "will permit the government to intervene * * * without awaiting the actual happening of the feared

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[12] Indeed, we believe that Congress's willingness to confront the need for pretrial detention openly and honestly is laudable and long overdue. Prior to the Bail Reform Act, pretrial detention shared the same heritage as plea bargaining; the courts, driven by necessity, employed it through "a *sub rosa* process shrouded in secrecy and deliberately concealed" (*Blackledge* v. *Allison*, 431 U.S. 63, 76 (1977)). Congress has rightly recognized that pretrial detention, like plea bargaining, is a legitimate component in the administration of justice provided that it is applied visibly, candidly, and thereby subject to judicial supervision and control. Cf. *ibid.*; *Santobello* v. *New York*, 404 U.S. 257, 260 (1971) ("The disposition of criminal charges by agreement * * * is an essential component of the administration of justice. Properly administered, it is to be encouraged."); Fed. R. Crim. P. 11.

event" (Resp. Br. 50 n.42).[13] We cannot believe that the government, having once thwarted a terrorist's plan, must release him and gamble—upon a wager of human life—that it can interdict him once again. Due process should not prohibit a court from concluding that the stakes are too high to brave that risk.

3. As his final argument, Salerno contends that the Bail Reform Act's procedures are constitutionally inadequate. This argument is plainly insubstantial. Salerno fails to identify any procedural shortcomings that, either singularly or in combination, would justify a facial invalidation of the statute. As our opening brief explains (Br. 35-39), Congress adopted rigorous procedural safeguards governing pretrial detention. Those procedures are plainly "adequate to authorize the pretrial detention of at least some [persons] charged with crimes" (*Schall*, 467 U.S. at 264); the procedures therefore meet the requirement for a finding of facial validity.

As Salerno concedes, "this particular case presents no procedurally based challenges to the act's constitutionality" (Resp. Br. 33-34 n.27). Salerno does not dispute the finding, made by the district court and affirmed by the court of appeals, that the statutory criteria for detention were amply satisfied in his case. Nor does he suggest that any of the alleged procedural shortcomings would have changed the outcome of the detention proceedings. Instead, he contends that the statutory language is vague and subject to overbroad application (*id.* at 34-37), and that

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[13] At the same time, Salerno qualifies his enthusiasm for that alternative by telling us that the imposition of "restrictive release conditions solely upon the ground of anticipated future dangerousness is not itself free from constitutional difficulty" (Resp. Br. 37 n.30).

the statute, as applied, may provide others with inadequate notice and opportunity for confrontation (*id.* at 37-42). We disagree. But in any event, as this Court noted in *Schall* (467 U.S. at 268-269 n.18):

> More fundamentally, this sort of attack must be made on a case-by-case basis. *United States* v. *Raines*, 362 U.S. 17, 21 (1960). The Court will not sift through the entire class to determine whether the statute was constitutionally applied in each case. And, outside the limited First Amendment context, a criminal statute may not be attacked as overbroad. See *New York* v. *Ferber*, 458 U.S. 747 (1982).

Salerno also argues that the Act should require that the defendant be given an opportunity to challenge the grand jury's finding of probable cause (Resp. Br. 42-43) and that his dangerousness be determined by proof beyond a reasonable doubt rather than by clear and convincing evidence (*id.* at 44-46).[14] But once again, Salerno does not contend that these statutory modifications would have made any difference to the outcome of his case.

4. The findings of the two courts below—which Salerno does not challenge—show the respondents to be lethally dangerous, unrestrained by any inhibition of conscience, and consummately shrewd and efficacious. The government has obtained an indictment and is proceeding to trial. The public, in the interim, can justifiably demand protection. It is conceded that

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[14] He adds, however, that "[t]his is not, of course, to suggest that a preventive detention statute incorporating these procedural protections would pass constitutional muster." (Resp. Br. 48).

the government may employ regulatory detention to protect the safety of participants in the trial process. And it is conceded that the government could restrain a person found dangerous by reason of derangement or illness. The Bail Reform Bail Act authorizes the same measure of protection on an interim basis, directly tied to a timely prosecution of persons shown by clear and convincing evidence to be dangerous because their will and self-control are firm and committed to public evil. What respondents and the court below would have us believe is that the Constitution absolutely denies society that protection. This is not a sensible proposition.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Petitioner

v.

ANTHONY SALERNO AND VINCENT CAFARO,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION

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---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Bar Association respectfully moves for leave to file the attached *amicus curiae* brief out of time. Because this Court ordered the petitioner's brief to be filed within fifteen days, the ABA has been unable to write, revise, and obtain approval of a brief within the time allowed under the Rules. Counsel for all parties have consented to the filing of this brief on this date. Their letters have been filed with the Clerk of the Court.

The American Bar Association (hereinafter ABA) is a voluntary, national membership organization of the legal profession. The ABA has been responsible for the preparation and implementation of a comprehensive set

of guidelines and recommendations for the criminal justice system, the ABA Standards for Criminal Justice (2d ed. 1980). Some of these Standards are directly concerned with pretrial detention and implicate some of the same constitutional questions as are raised by this case. Because the parties to this case are unlikely to bring these Standards to the attention of the Court, the ABA seeks to participate as *amicus curiae*.

While this brief is out of time under Rule 36, the ABA believes that there are compelling circumstances that would warrant the granting of leave to file on this date.

First, this case has been briefed under an unusual schedule. On November 3, 1986, when the petition for certiorari was granted, this Court granted the Solicitor General's motion for expedited consideration. The Court directed the filing of the Solicitor General's brief on November 18, 1986 and the respondents' brief on December 18, 1986. The extraordinary fifteen-day period for the filing of the petitioner's brief left little time for the preparation of *amicus curiae* briefs.

Second, the ABA has moved with expedition to prepare and submit this brief. Although the ABA has followed this case with interest, it was not possible to begin the lengthy and careful process of preparing an *amicus* brief until this Court granted review on November 3, 1986. Since that date, ABA committees with an interest in this case have worked quickly to draft both the application to the Board of Governors which is a prerequisite to the filing of an ABA brief and the brief itself. Because the ABA is a national organization representing a large cross-section of the legal community, it was essential that this brief be carefully reviewed, discussed, and approved within the ABA, as well as edited and printed. Despite this lengthy review process, this brief has been submitted in less than the 45 days from the granting of the peti-

tion—which is the minimum contemplated under the Rules for an *amicus curiae* brief.

Third, the filing of this brief on December 8, 1986 will not prejudice other parties. The respondents will have adequate time to include any response to this *amicus* brief in their brief, which is due on December 18, 1986. The Solicitor General will also have an opportunity to respond. In fact, all parties have consented to the filing of the ABA's brief *amicus curiae* on this date.

Because of the compelling circumstances arising from the expedited briefing schedule in this case, the ABA's efforts to conform in substance to the dictates of Rule 36, and the contribution that this brief may make to analysis of the important constitutional issue before the Court, the ABA respectfully requests leave to file the attached brief *amicus curiae* out of time.

Respectfully submitted,

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December 8, 1986

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---

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The American Bar Association (hereinafter ABA) is a voluntary, national membership organization of the legal profession. Its more than 329,000 members come from every state, territory, and the District of Columbia. Its constituency includes prosecutors, public defenders, private lawyers, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and corrections personnel, law students, and a number of nonlawyer "associates" in allied fields. Since its inception over 100 years ago, the ABA has taken an

active interest in the improvement of the administration of justice.

The ABA Standards for Criminal Justice (hereinafter ABA Standards) are a comprehensive set of "guidelines and recommendations intended to help criminal justice planners design a system, set goals and priorities to achieve it, and propose procedures for adoption by the legislatures, courts and practitioners to operate and keep it viable—all targeted toward achieving a criminal justice system that is fair, balanced, and constitutionally responsive to the needs of today and the future." American Bar Association Standards at xx (2d ed. 1980). The first edition of the Standards was described by former Chief Justice Burger as the "single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974).

ABA Standard 10-5.4 [1] sets out bases for preventive detention where the defendant has been charged with a "felony involving acts causing, threatening, or creating a substantial risk of death or serious bodily harm" and one of several criteria are present which indicate that the defendant poses a risk to the "safety of any person or the community. . ." This Standard is designed to serve as a model for jurisdictions considering the adoption or revision of criminal justice procedures addressing preventive detention.

In addition to the Association's general interest in guidelines for imposing pretrial restraint, its interest in

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[1] For the convenience of the Court, the principal ABA Standards relating to pretrial detention have been reproduced in an appendix to this Brief. The ABA Standards relating to Pretrial Release (Chapter 10) were revised in 1985 and an interim Commentary was published in 1986. *See* American Bar Association Standards for Criminal Justice (2d ed. 1980 Revised 1985).

this case is particularly keen because an issue before the Court is whether Congress may constitutionally make the public's interest in personal safety a decisive factor for a court in determining whether a defendant should be detained. That factor is an integral part of Standard 10-5.4 and the Court's disposition of this case could have a substantial and direct impact on the vitality of that Standard.

SUMMARY OF ARGUMENT

The American Bar Association believes that, although pretrial restraint should be used sparingly and under tightly controlled criteria, a demonstrated risk of danger either to the community or to an individual is a compelling governmental interest that may constitutionally justify deprivation of the defendant's liberty for a limited period of time prior to trial.

The liberty interest of a defendant must be balanced against legitimate and compelling interests of the public. Protection of the safety of either an individual or the community is an interest that, when accompanied by adequate procedural safeguards, can validate preventive detention.

Under the traditional tests for determining whether a measure is impermissibly punitive or instead a permissible regulatory restraint, preventive detention does not *per se* constitute punishment.

It is submitted that, where there has been a determination of probable cause to believe that a person has committed a serious crime, a court may constitutionally impose a brief period of preventive detention to protect the safety of an individual or the community against additional crimes, provided that there are adequate procedural safeguards assuring the brevity of the detention and the reliability of the determinations as to the specific danger from the defendants.

ARGUMENT

PREVENTIVE DETENTION OF A DEFENDANT BECAUSE OF DANGER TO THE COMMUNITY OR TO AN INDIVIDUAL COMPORTS WITH SUBSTANTIVE DUE PROCESS

In recent years there has been a growing concern over the risks posed by persons who have been formally charged with crimes but have been released pending trial and while in that status commit acts that threaten or injure others. In response to that concern, the Congress [2] and several states [3] have amended their bail regulations to provide for preventive detention where there is a strong indication that a defendant's release pending trial would physically endanger an individual or the community. This factor does not supplant the more traditional ground of detention, risk of flight,[4] which is designed to insure that a charged defendant will appear for trial and that the judicial process will not be frustrated.

The addition of the separately identifiable ground of dangerousness is based on the government's strong interest in protecting other potential victims from crimes. Moreover, in some cases, a defendant's interest in not fleeing may well hinge on his ability to profit from his continued criminal activity—activity which may pose a substantial danger to the community.

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[2] *See* Bail Reform Act of 1984, 18 U.S.C. (Supp. II) § 3141 *et seq.*

[3] *See, e.g.*, Ariz. Const. Art. I, § 22.3; Cal. Const. Art. I, § 12; Colo. Const. Art. II, § 19(b); D.C. Code Ann. § 23-1322 (1981 & Supp. 1985); Fla. Const. Art. I, § 14; Ill. Const. Art. I, § 9 (approved Nov. 1986); Code of Va. § 19-2-120, 126. *See also* 1984 Manual for Courts-Martial, R.C.M. 305(h)(2)(B) which provides for pretrial confinement of servicemembers who pose a danger.

[4] In some cases it may be necessary briefly to detain a material witness. 18 U.S.C. (Supp. II) § 3144. And in some instances it may be constitutionally appropriate to detain a defendant for his own protection. *See Schall v. Martin*, 467 U.S. 253, 265-266 (1984).

A. The ABA Standards For Preventive Detention

The American Bar Association generally disfavors pretrial restraint.[5] Nevertheless, the ABA Standards recognize that, under limited circumstances, preventive detention may be legitimately grounded on safety considerations of the community at large. This policy is reflected in ABA Standard 10-5.4, which permits preventive detention in precisely defined circumstances and when the judicial officer concludes that no conditions on release will reasonably assure the safety of any person or the community:

> (a) Preventive detention prior to any form of release on a defendant's current criminal charge:
>
> (i) Preventive detention may be imposed against a defendant who has been charged with a felony involving acts causing, threatening, or creating a substantial risk of death or serious bodily harm if:
>
> (A) the crime was allegedly committed while the defendant was, with respect to another felony of violence, currently on pretrial or other release or on release pending completion of sentence, and the judicial officer finds that no condition or combination of conditions will reasonably assure the safety of any person or the community, or reasonably prevent intimidation of a witness and interference with the orderly administration of criminal justice; or if,
>
> (B) the defendant's pattern of behavior, consisting of past and present conduct, and specifically including a conviction for at least one felony involving violence within the preceding [ten] years, supports a judicial finding that no condition or combination of conditions will reasonably assure the safety of any person and the commu-

[5] *See* ABA Standard for Criminal Justice 10-1.1 (2d ed. 1980 Revised 1985).

> nity, or reasonably prevent intimidation of a witness and interference with the orderly administration of criminal justice.

This ABA Standard differs somewhat from the Bail Reform Act of 1984, 18 U.S.C. (Supp. II) § 3142(e). Like the Act, the Standard requires a showing that no other condition or combination of conditions would reasonably assure the safety of the community or the orderly administration of justice.[6] But the Standard also requires, first, that the defendant has been charged with a felony involving a risk of serious bodily harm and second, that the defendant has either been on release from a prior charge or conviction for a felony of violence or has been convicted of a felony of violence within a limited number of years. In the present case it appears that, at the time of the determination to impose preventive detention, neither of the respondents had a prior felony detention or conviction, and thus would not have satisfied the criteria set out in ABA Standard 10-5.4.

However, under the reasoning of the Court of Appeals in this case, it appears that even a statute that conforms with all of the ABA Standards could be held invalid on substantive due process grounds.[7] The ABA disagrees with any such application of the constitutional standard. A statute limited to preventing crimes of violence and containing appropriate procedural safeguards would, we submit, satisfy due process requirements.[8]

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[6] 18 U.S.C. § 3142(e) provides in part:

If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assert the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.

[7] *See, e.g.*, 794 F.2d at 73, ("[E]ven the probability that a convicted criminal will again engage in crime does not sanction his incarceration simply in anticipation of such future crimes.")

[8] The ABA's opposition to the New York juvenile justice statute involved in *Schall* v. *Martin*, 467 U.S. 253, 281 (1984), as expressed

B. Preventive Detention Can Satisfy Substantive Due Process

The issue which the ABA addresses is whether a jurisdiction under any circumstances may constitutionally detain a person charged with a violent crime because of prospective danger to the community. The ABA believes that under the tests employed by this Court in measuring substantive due process, according such weight to prospective dangerousness passes constitutional muster.

Pretrial detention is disfavored because of the limits that it places not only upon the defendant's freedom of movement but also upon his ability to prepare for trial and freely consult with counsel. ABA Standard 10-1.1 provides in part:

> Because deprivation of liberty pending trial is harsh and oppressive, subjects persons to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances deprives their families of support, these standards limit the circumstances under which preventive detention may be authorized and provide procedural safeguards to govern preventive detention proceedings.

While the right to unencumbered liberty pending trial is, therefore, of great importance, it is not absolute. Throughout the process of pretrial investigation, and

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in its *amicus* brief, rested on the absence of any such substantive limitations and procedural safeguards in the New York juvenile detention statute. The Court's ruling established that they were not required as a matter of constitutional law in the context of juvenile pretrial detention. The draftsmen of the Bail Reform Act were nevertheless properly concerned with the problems that disturbed the ABA and also the dissenting Justices in *Schall*. In particular, the Bail Reform Act's emphasis on public safety contrasts with the broad reference in the New York statute to any act which "would constitute a crime." Accordingly, even though the statute in *Schall* involved detention of juveniles rather than adults, the Bail Reform Act is substantially more narrow and precise than the New York statute upheld in *Schall*.

pretrial, trial, and post-trial proceedings, the weight to be given a defendant's liberty and privacy interest will vary with the degree of legitimate governmental interest at stake. For example, reasonable suspicion that criminal activity is afoot will support a stop [*Terry* v. *Ohio*, 392 U.S. 1 (1986)] and probable cause will support an arrest and brief detention to take necessary administrative steps incident to an arrest. *Gerstein* v. *Pugh*, 420 U.S. 103, 113-114 (1975). A judicial officer may detain a suspect to insure his presence at trial. *Bell* v. *Wolfish*, 441 U.S. 520, 534 (1979).

What this sliding scale approach makes clear is that a person charged with criminal activity retains important liberty interests, but countervailing and legitimate government interests may, when controlled by manageable procedural due process constraints, carry sufficient weight to permit limitations on that liberty interest. At a minimum, the defendant's interests are limited by the very fact that he is subject to the call of the court and to any conditions of release that may have been imposed.

The question of principle involved in this case is whether the government's countervailing concern for the safety of an individual or the community as a whole is ever sufficiently important to justify deprivation of a defendant's liberty prior to conviction. We believe that the government has a compelling interest in protecting either an individual or the community at large from further dangerous conduct while the government presses pending charges for a serious crime. The prevention of crime is a "weighty social objective," *Brown* v. *Texas*, 443 U.S. 47, 52 (1979), and the legitimate and compelling state interest in protecting the safety of the community against crimes of violence "cannot be doubted." *Schall* v. *Martin*, *supra* at 264 citing *De Veau* v. *Braisted*, 363 U.S. 144, 155 (1960). *See also United States* v. *Perry*, 788 F.2d 100 (3d Cir. 1986).

Thus, in *Schall*, this Court concluded that the interest in preventing crime, together with the public's interest

in protecting the juvenile from the consequences of his own future criminal activity, was sufficient to justify pretrial detention. While in *Schall* the competing interests of the public and the individual were weighed in the context of detention of a juvenile, the ABA believes that in limited circumstances, pretrial detention of an adult is also justifiable.[9] The liberty interest of an adult is undoubtedly more substantial than that of a juvenile who is "always in some form of custody." *Schall, supra*, at 265. But the threat posed to an individual or community by an adult may be significantly greater as well because of "superior access to the means of committing more serious and far-reaching offenses." *United States* v. *Salerno*, 794 F.2d 64, 76 (2d Cir. 1986) (Feinberg, C.J., dissenting), and the greater potential for organized criminal activity.

Moreover, the statutory scheme in *Schall* was concerned with "crime prevention" generally. As the dissenting opinion emphasized, 467 U.S. at 283, 295, 297, and the majority acknowledged, 467 U.S. at 268 n.18, the New York statute authorized pretrial detention even where the defendant had been charged with a relatively minor offense or was thought likely to commit only such an offense. The ABA Standard narrowly focuses upon protecting the physical safety of an individual or the community as being entitled to significantly more weight than a generalized interest in preventing crime.[10]

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[9] While it is not clear whether the Court considered either of the two interests in *Schall* sufficient in itself to support preventive detention, the government's interest in protecting safety of the community should be independently sufficient where specific indicia of dangerousness have been satisfied, such as by prior indictment or conviction for a violent crime.

[10] The Court of Appeals did not draw this distinction. Instead, it generally discussed the government's interest in stemming criminal activity, rather than the more specific interest of protecting the physical safety of its citizenry. *Compare*, 794 F.2d at 74, *with*

The compelling nature of the public's interest in safety is amply demonstrated by the legislative history of the 1984 amendments to the federal Bail Reform Act. Congress recognized that judicial officers faced with a clearly dangerous defendant had been forced either to free the defendant or to set extremely high money bonds ostensibly for the purpose of insuring presence at trial. The first option left the community open to victimization and the second forced hypocrisy on the judicial officer as the price of protecting the community. The resulting broad-based calls for reform came from the President of the United States, Chief Justice Warren Burger, the Attorney General's Task Force on Violent Crime, and a number of national organizations.[11]

The factual conclusions of Congress as to the need for preventive detention should be given substantial weight. Congress recognized that predicting risks to the community is not an exact science, and concluded that a judge considering such factors as the nature of the offense and the defendant's past record could make such a prediction with an "acceptable level of accuracy."[12] This Court reached a similar conclusion in *Schall* v. *Martin*, *supra* at 278-279, when it stated that "from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct."

C. Preventive Detention Can be a Reasonable Regulatory Restraint

Under *Schall*, the second step in analyzing whether pretrial detention is permissible is to determine whether preventive detention based upon dangerousness is a regulatory restraint or instead an impermissible punitive

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S. Rep. No. 225, 98th Cong., 1st Sess. 10, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3193, citing the testimony of the Department of Justice.

[11] S. Rep. No. 225 at 5, 1984 U.S. Code Cong. & Ad. News at 3187.

[12] S. Rep. No. 225 at 9, 1984 U.S. Code Cong. & Ad. News at 3192.

measure. As this Court has noted, pretrial detention does not in and of itself amount to punishment. *Bell* v. *Wolfish*, 441 U.S. 520, 535-539 (1979); *Schall* v. *Martin*, 467 U.S. at 269. In *Schall*, the Court stated (at 269):

> "A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell* v. *Wolfish*, 441 U.S. at 538. Absent a showing of an express intent to punish on the part of the State, that determination generally will turn on "whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. at 168-169.

Preventive detention on grounds of dangerousness may satisfy this test. Such detention may be based upon an "alternative purpose": insuring the safety of the community.[13] Any punishment will be left to the outcome of the trial of the pending criminal charge. Similarly, detaining the dangerous defendant is a rational means of furthering that compelling interest and is not *per se* excessive. That a defendant might be detained under rigorous or closely monitored conditions does not detract from that interest nor does it facially indicate that the defendant is being punished rather than restrained.

Thus, the temporary "preventive detention" of an indicted defendant based upon prospective dangerousness

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[13] For example, the Bail Reform Act provisions for preventive detention are triggered in part by certain specified serious felonies which Congress concluded pose some significant risk of danger to the community. The Act further provides that preventive detention may be imposed only after the "judicial officer finds that no condition or combination of conditions will reasonably assure the safety of any other person and the community." 18 U.S.C. (Supp. II) § 3142(e). The applicable ABA Standard, 10-5.4, envisions that preventive detention may occur only where a "crime of violence" is involved and the judicial officer reaches a similar conclusion.

can serve a regulatory purpose and need not be punitive. Its proper characterization in a particular case depends upon whether the authorizing statute contains standards and limitations that show that temporary restraint rather than punishment is its goal.[14]

D. Procedural Safeguards for Preventive Detention

There remains, of course, the important issue of whether the procedures prescribed by statute adequately protect the defendant from unnecessary or erroneous deprivation of his important liberty interests. The majority opinion in the Court of Appeals' decision did not address the question of whether the procedures used in the Bail Reform Act for determining dangerousness are constitutional.[15] The ABA submits that procedural safeguards are of critical importance to the constitutionality of provisions for preventive detention.

In its Standards, the ABA sets out the procedural safeguards that it believes legislatures should adopt to protect the defendant from an unnecessary or erroneous deprivation of liberty. Some of these safeguards are recommended as a matter of policy; others are constitutionally required.[16] The principal procedural rights embodied in the Standards include:

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[14] In considering amendments to the 1966 Bail Reform Act, Congress was aware of the potential constitutional challenge that preventive detention amounts to punishment. The legislative history indicates that Congress specifically concluded that such detention is not designed to serve as punishment. S. Rep. No. 225 at 8, 1984 U.S. Code Cong. & Ad. News at 3191, citing *United States v. Edwards*, 430 A.2d 1321 (D.C. App. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).

[15] The Court of Appeals did address the issue of whether the evidence was sufficient under the Bail Reform Act to support detention. It concluded that the respondents did pose a threat to the community. 794 F.2d at 71.

[16] Since the Court below did not address any procedural due process issues, they are not discussed here.

1. A written statement of the prosecutor's reasons for seeking pretrial detention, Standard 10-5.4 (a) (ii);
2. An immediate hearing, Standard 10-5.4 (a) (iii);
3. A right to counsel and appointment of counsel if the defendant cannot afford one, Standard 10-5.10(a) (i);
4. A right to present and cross-examine witnesses, Standard 10-5.10(a) (ii), (iii);
5. Application of the rules of evidence, Standard 10-5.10(c);
6. Proof by clear and convincing evidence that the criteria for preventive detention have been met, Standard 10-5.10(e);
7. Written findings of fact and statement of reasons for detention, Standard 10-5.10(f) (ii).
8. An order stating the date by which pretrial detention must terminate, Standard 10-5.10(f) (iii);
9. An expedited right of appeal, Standard 10-5.10 (g); and
10. A right to request an additional hearing based upon changed or additional circumstances, Standard 10-5.6.

The Association's Standards represent an attempt to balance the competing interests of the individual and the government, and propose procedural protections designed to insure an acceptable degree of accuracy in the decision to detain.

CONCLUSION

For the foregoing reasons, principles of substantive due process do not preclude a court from relying on danger to an individual or the community in ordering pretrial detention of a defendant formally charged with a serious crime.

Respectfully submitted,

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APPENDIX

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AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE ADDRESSING PRETRIAL DETENTION

Standard 10-1.1. Policy favoring release and exceptions to release

The law favors the release of defendants pending determinations of guilt or innocence. These standards recognize, however, that in a limited number of cases there may be exceptions to this policy and establish specific criteria and procedures for effecting the pretrial detention of certain defendants after determinations that these defendants pose significant threats to the safety of the community and the administration of criminal justice.

Because deprivation of liberty pending trial is harsh and oppressive, subjects persons to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support, these standards limit the circumstances under which preventive detention may be authorized and provide procedural safeguards to govern preventive detention proceedings.

These standards also provide for conditional release pending diversion as defined within standard 10-1.2(h) to further the rehabilitation needs of some defendants and to divert them from criminal prosecution on the successful completion of court-ordered programs.

Standard 10-5.4. Bases for preventive detention; initiation of hearing

(a) Preventive detention prior to any form of release on a defendant's current criminal charge:

(i) Preventive detention may be imposed against a defendant who has been charged with a felony involving acts causing, threatening, or creating a substantial risk of death or serious bodily harm if:

(A) the crime was allegedly committed while the defendant was, with respect to another felony of violence, currently on pretrial or other release or on release pending completion of a sentence, and the judicial officer finds that no condition or combination of conditions will reasonably assure the safety of any person or the community, or reasonably prevent intimidation of a witness and interference with the orderly administration of criminal justice; or if,

(B) the defendant's pattern of behavior, consisting of past and present conduct, and specifically including a conviction for at least one felony involving violence within the preceding [ten] years, supports a judicial finding that no condition or combination of conditions will reasonably assure the safety of any person and the community, or reasonably prevent intimidation of a witness and interference with the orderly administration of criminal justice.

(ii) Preventive detention proceedings under subparagraph (a) (i) should be initiated by written motion of the prosecuting attorney submitted to a court of general criminal trial jurisdiction in which the defendant will be tried. The prosecuting attorney's motion should recite the prosecutor's reasons for believing that the defendant meets the requirements for preventive detention as set forth in subparagraphs (a) (i) (A) or (a) (i) (B). A motion to initiate preventive detention proceedings should, however, be proper at any time regardless of a defendant's pretrial release status.

(iii) On receipt of the prosecuting attorney's motion to initiate preventive detention proceedings, the court should convene an immediate hearing. A preventive detention hearing may be delayed for a period not to exceed [three] calendar days for cause shown.

(iv) The defendant may be provisionally detained during the [three] day delay period provided for in paragraph (a)(iii); provided, however, that a provisionally detained defendant must be released if a preventive detention hearing is not held within that time period.

(b) Preventive detention subsequent to a defendant's release under any conditions for the current criminal charge:

(i) Preventive detention may be imposed against a defendant who:

(A) has committed a new offense or has violated any other condition of his or her release and represents a danger to the community or to the administration of criminal justice; or

(B) has already been detained because of an inability to meet monetary release conditions under the provisions of standard 10-5.3 and is likely to flee, and no less stringent conditions will reasonably assure the defendant's appearance in court or assure the safety of the community.

Provisions for initiating preventive detention proceedings against such defendants are set forth within this standard and provisions governing such proceedings are set forth within standard 10-5.10.

(ii) A judicial officer should promptly convene a preventive detention hearing whenever;

(A) a motion, verified complaint, or sworn affidavit has been filed notifying the court that a released defendant has committed one or more acts delineated in subparagraph (b)(i)(A); or,

(B) a prosecuting attorney has reported under standard 10-5.6(b) that a defendant has been detained for [five] calendar days because of an inability to meet monetary release condi-

tions under standard 10-5.3 and subparagraph (b) (i) (B) of this standard; or,

(C) a defendant has been taken into custody with or without judicial authorization and produced before the judicial officer pursuant to standard 10-5.8 or 10-5.9.

(iii) In addition, a judicial officer should convene a preventive detention hearing whenever the prosecuting attorney, a law enforcement officer, a representative of the pretrial services agency, or any other organization or person into whose custody a defendant has been conditionally released pending diversion notifies the court by motion, by verified complaint, or by sworn affidavit that a released defendant has refused to participate or cooperate in a court-ordered program, is likely to flee or to threaten or intimidate witnesses or court personnel, or constitutes a danger to the community.

(iv) The prompt holding of a preventive detention hearing after receipt of the motions, verified complaints, or sworn affidavits described within paragraph (b) obliges the court to convene an immediate hearing whenever possible. In no event should a hearing be delayed by more than [five] calendar days. Continuances should be denied unless the parties concerned and the court determine that the interests of justice require a continuance. In no event should a continuance exceed [three] calendar days.

Standard 10-5.6. Review of release or detention decision: status reports regarding pretrial detainees

(a) Upon motion by the defense or the prosecution alleging changed or additional circumstances, the court should promptly reexamine its release decision including

any conditions placed upon release or its decision authorizing preventive detention under standard 10-5.4.

(b) The prosecuting attorney should be required to report to the court as to each defendant, other than one preventively detained under standard 10-5.4, who has failed to obtain release within [five] calendar days after entry of an order under standard 10-5.3 and to advise the court of the status of the case and of the reasons why a defendant has not been released or tried.

(c) For pretrial detainees subject to preventive detention orders the prosecuting attorney should file frequent and periodic reports with the court regarding the status of the defendant's case and of steps being taken to expedite trial.

Standard 10-5.10. Procedures governing preventive detention hearings: judicial orders for detention and appellate review

(a) Defendant's rights at hearing: At any preventive detention hearing held pursuant to the standards within this chapter defendants should have the following rights:

(i) the right to be present and the right to be represented by counsel, including appointed counsel if the defendant is financially unable to obtain counsel;

(ii) the right to have an opportunity to testify and to present witnesses on his or her own behalf;

(iii) the right to confront and to cross-examine prosecution witnesses; and,

(iv) the right to present information by proffer or otherwise.

(b) Discovery: In order to provide adequate information to both sides in preparation for a preventive detention hearing, discovery should be as full and free as possible, consistent with chapter 11 (Discovery and Procedure Before Trial) of these standards.

(c) Rules governing evidence: At any preventive detention hearing held pursuant to this chapter the rules governing admissibility of evidence in criminal trials should apply and all evidence should be recorded. The testimony of a defendant, including evidence derived from that testimony, should not be admissible in any other judicial proceedings against the defendant other than a prosecution for perjury based upon that testimony.

(d) Burden of production: The prosecuting attorney should have the burden of going forward with evidence in support of a preventive detention motion.

(e) Burden of proof: The prosecuting attorney should bear the burden of proof in accordance with the following provisions:

(i) In preventive detention proceedings under standard 10-5.4 (a) (i) or (b) (i) (A):

(A) the prosecuting attorney should bear the burden of establishing by a prima facie case that the defendant committed the predicate offense required under those standards; and, in addition,

(B) the prosecuting attorney should also bear the burden of establishing by clear and convincing proof the applicable remaining factors set forth and required in either standard 10-5.4 (a) (i) (A), or (a) (i) (B), or (b) (i) (A).

(ii) In preventive detention proceedings initiated pursuant to the provisions of standard 10-5.4 (b) (i) (B) the prosecuting attorney should bear the burden of establishing by clear and convincing proof that the defendant is likely to flee and that neither additional monetary bond nor other conditional forms of release will reasonably assure the defendant's appearance or will reasonably protect the safety of the community.

(f) Judicial order for preventive detention:

(i) No order for preventive detention should be entered by the court except on the conclusion of a full preventive detention hearing as provided for within these standards.

(ii) If, on conclusion of a preventive detention hearing, the court determines by clear and convincing evidence that the defendant represents a danger to the community pursuant to the criteria established within these standards, the court should enter a written preventive detention order. That order should be based solely upon evidence adduced at the preventive detention hearing and should be entered within [twenty-four] hours of the conclusion of the hearing. Moreover, the court's order should include the findings of fact and conclusions of law supporting the reasons that the safety of the community, the integrity of the judicial process, and the presence of the defendant cannot be reasonably assured by accelerating the date of trial or by imposing additional conditions on release.

(iii) The court's order for preventive detention should include the date by which the detention must terminate pursuant to standard 10-5.11.

(g) Appellate review of preventive detention orders: A judicial order concerning preventive detention under these standards should be subject to expedited appellate review at the instance of the prosecution or defense attorney.

Standard 10-5.11. Requirement for accelerated trial for preventively detained defendants

Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which preventively detained defendants should be tried. These accelerated time limitations should be shorter than current

speedy trial time limitations applicable to defendants at liberty pending trial. A failure to try a preventively detained defendant within such accelerated time limitations should result in the defendant's immediate release from detention pending trial.

Standard 10-5.12. Trial

The fact that a defendant has been detained pending trial should not be allowed to prejudice the defendant at the time of trial or sentencing. Care should be taken to ensure that the trial jury is unaware of the defendant's detention.

Standard 10-5.13. Credit for preadjudication detention

Every convicted defendant should be given credit, against both a maximum and minimum term or a determinate sentence, for all time spent in custody as a result of the criminal charge for which a sentence of imprisonment is imposed, or as a result of related offenses.

Standard 10-5.14. Release of a preventively detained defendant to prepare for trial

On motion by defense counsel including a showing of compelling necessity related to the preparation of the defendant's case, a judicial officer who entered an order of preventive detention under standard 10-5.10(f) pursuant to the criteria of standard 10-5.4 should be authorized to permit the temporary release of a preventively detained person in the custody of a law enforcement officer. No such release should be for a period exceeding [six] consecutive hours.

Standard 10-5.15. Circumstances of confinement of defendants detained pending adjudication

Defendants who are detained pending adjudication should be confined in facilities separate from convicted

persons awaiting sentencing or serving sentences or held in custody pending appeal. Restrictions on the rights defendants would have as free citizens should be as minimal as necessary to assure their orderly confinement and interaction or to provide reasonable protection for the rights and physical safety of all members of the detention system and the general public. The rights and privileges of defendants detained pending adjudication should not be more restricted than those of convicted defendants who are imprisoned.

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In The
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October Term, 1986

UNITED STATES OF AMERICA,
Petitioner,

v.

ANTHONY SALERNO and VINCENT CAFARO,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

MOTION TO FILE BRIEF
AND
BRIEF AMICI CURIAE OF
AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.,
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE LEGAL FOUNDATION OF AMERICA,
THE NATIONAL DISTRICT ATTORNEYS
ASSOCIATION, INC., AND THE
NATIONAL SHERIFFS' ASSOCIATION,
IN SUPPORT OF THE PETITIONER.

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MOTION OF AMICI CURIAE TO FILE BRIEF

Come now Americans for Effective Law Enforcement, Inc., *et al.*, and move this Court for leave to file the attached brief as *amici curiae,* and declare as follows:

1. *Identity and Interest of Amici Curiae.* The *amici curiae* are described as follows:

Americans for Effective law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-seven times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The Legal Foundation of America (LFA), is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

The National District Attorneys Association, Inc.

(NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Fourteenth Amendment.

2. *Desirability of an Amici Curiae Brief.* *Amici* are professional associations representing the interests of law enforcement agencies at the national, state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility, *inter alia*, of enforcing state bail provisions and making bail recommendations to courts; and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers, administrators and courts in connection with bail matters.

Because of the relationship with our members, and the composition of our membership and directors-including active law enforcement administrators and counsel-we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, IACP, LFA, NDAA, and NSA

are national associations, and their perspective is nationwide. This brief concentrates on policy issues, including the values served by bail provisions that take into consideration the safety of the community, and the need to give prosecutorial agencies and courts clear guidance with respect thereto. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* has reviewed the Petition for Certiorari and the brief of counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents certain policy issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consents of Petitioner and Respondent Salerno have been received and filed with the clerk of this Court. This Motion is necessary because Respondent Cafaro has not as of the time of printing of the Brief granted consent to the *amici* in writing. Should it be received thereafter it will be filed with the clerk of this Court.

For these reasons, the *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

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No. 86-87

In The Supreme Court of the United States

October Term, 1986

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTHONY SALERNO and VINCENT CAFARO,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE LEGAL FOUNDATION OF AMERICA, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE PETITIONER.

INTEREST OF AMICI CURIAE

The Interest of Amici Curiae is as stated in the above Motion to File Brief.

ARGUMENT

THE BAIL REFORM ACT OF 1984, 18 U.S.C. SECTION 3142(e), WHICH AUTHORIZES PRETRIAL DETENTION OF AN INDICTED DEFENDANT IF NO RELEASE CONDITION "WILL REASONABLY ASSURE * * * THE SAFETY OF ANY OTHER PERSON IN THE COMMUNITY" IS NOT UNCONSTITUTIONAL; AS A MATTER OF PUBLIC POLICY, THE PEOPLE MUST BE ABLE TO TAKE RESPONSIBLE AND CONSTITUTIONAL MEASURES TO SECURE THEIR SAFETY AND WELL-BEING IN BAIL MATTERS.

The court below, *U.S. v. Salerno,* 794 F.2d 64 (2nd Cir. 1985), ruled that the provision of the Bail Reform Act of 1984, 18 U.S.C. Section 3142(e), which permits pretrial detention on the ground that no combination of release conditions will reasonably assure the safety of the community or of any person, violates the Fifth Amendment Due Process Clause.

Amici curiae will not duplicate the case law analysis presented by the Petitioner United States of America in this case, although we agree with that analysis. Instead, we will concentrate upon issues of policy that concern our law enforcement constituency and the communities they represent. The traditional purpose of bail is to assure the trial court that the defendant will appear for trial. In 1984 Congress enacted the Bail Reform Act of 1984 which provides that bail may be denied in the federal system if (1) there is no reasonable assurance that the person will appear as required, or (2) release will endanger the safety of any other person or the community. The latter provision is in the nature of preventive detention.

Although this Court declined to consider the issue of preventive detention for adults in *Murphy v. Hunt,* 455 U.S. 478 (1982), a 6-3 majority of the Court in

Schall v. Martin, 467 U.S. 253, 104 S.Ct. 2403 (1984), had no difficulty resolving the issue for juveniles. In an opinion written by then Associate Justice Rehnquist, the Court held that New York's statute providing for the detention of an accused juvenile delinquent on the basis of a finding of a "serious risk" that he may, before his case is adjudicated, commit a criminal act does not violate the Due Process Clause of the Fourteenth Amendment. The Court found a legitimate state interest for such statutes, stating that, "the combined interest in protecting both the community and the juvenile himself from the consequences of future criminal conduct is sufficient to justify such detention." Thus, while the juvenile may have a substantial interest in his freedom, under appropriate circumstances a state's interest in promoting public safety is equally important. The statute was not used or intended as punishment; the detention was strictly limited in time, and conditions of confinement reflected proper regulatory purposes. The Court also found sufficient procedural protections in the statute to satisfy the Fourteenth Amendment: notice, a hearing, and a statement of facts and reasons were afforded a juvenile prior to any detention; additionally, a formal probable cause hearing was provided shortly thereafter. The Court noted that such statutes have gained universal acceptance among the states:

> The substantiality and legitimacy of the state interests underlying this statute are confirmed by the wide-spread use and judicial acceptance of preventive detention for juveniles. Every State, as well as the United States in the District of Columbia, permits preventive detention of juveniles accused of crime. A number of model juvenile justice acts also contain provisions permitting preventive detention. And the courts of eight States, including the New York Court of Appeals, have upheld their statutes with specific reference to protecting the juvenile and the community from harmful pretrial conduct, including pretrial crime.

104 S.Ct. at 2411-2412.

Amici submit that the preventive detention provisions of the 1984 Act represent Congress' considered response to the problem of balancing the right of individuals charged with crime to be free pending trial, and the community's interest in protecting itself from those defendants who would continue to prey upon innocent victims pending trial. The issues are the same whether the offender is a juvenile or an adult. Indeed, as noted by the Petitioner, the majority of federal courts that have considered the constitutional issues involved in such provisions have found that the Act does not violate due process. *See, e.g., United States v. Walker,* Nos. 86-5264 and 86-5272 (9th Cir. Nov. 5, 1986); *United States v. Rodriguez,* No. 86-5631 (11th Cir. Oct. 14, 1986); *United States v. Simpkins,* No. 86-3049 (D.C. Cir. Oct. 6, 1986); *United States v. Zannino,* 798 F.2d 544 (1st Cir. 1986); *United States v. Perry,* 788 F.2d 100 (3d Cir.), cert. denied, No. 86-5172 (Oct. 6, 1986); *United States v. Portes,* 786 F.2d 758, 767 (7th Cir. 1985); *United States v. Accetturo,* 623 F. Supp. 746 (D.N.J. 1985), aff'd, 783 F.2d 382 (3d Cir. 1986); *United States v. Freitas,* 602 F. Supp. 1283 (N.D. Cal. 1985); *United States v. Acevedo-Ramos,* 600 F. Supp. 501 (D.P.R. 1984), aff'd, 755 F.2d 203 (1st Cir. 1985); *United States v. Hazzard,* 598 F. Supp. 1442, 1450-1452 (N.D. Ill. 1984). In addition, several states have amended their constitutions or have passed statutes to permit pretrial detention based on a finding of danger to the community. See Ariz. Const. art. I, §22(3); Ariz. Rev. Stat. Ann., §13-1961B (1985 Supp.); Cal. Const. art. I, §12(b); Colo. Const. art. II, §19(b); Fla. Const. art. I, §14; Fla. Stat. Ann., §907.041(4); Code Va., §19.2-120(2) (1983); most recently (November 4, 1986), the electorate of Illinois, by a 77 per cent margin, approved a state constitutional amendment:

> . . .to empower judges to deny bail to persons charged with felonies which carry mandatory

> prison sentences upon conviction if the proof is evident or the presumption great that the person charged committed the crime and if the court, after a hearing, finds that the defendant poses a threat to the safety of any person.

Chicago Tribune, November 6, 1986, Section 1, p. 5.

Amici submit that bail has never been perceived as an absolute right in our American system of justice and should not be perceived as a single function mechanism in this framework. Respondents may view the primary function of bail as a method of assuring that a defendant will appear at his trial. There is a significant danger, however, in accepting this as the *sole* purpose and function of bail. Pretrial release, by its very nature and practical application, can and must also be a method of protecting the law-abiding members of our communities.

On February 8, 1981, in his Annual Report on the Judiciary to the American Bar Association, then Chief Justice Burger of this Court directly addressed this point, when he stated:

> I am not advocating a new idea but merely restating an old one that we have ignored. At this point judicial discretion and judicial restraint require me to stop and simply to repeat that governments were instituted and exist chiefly to protect people. If governments fail in this basic duty they are not excused or redeemed by showing that they have established the most perfect systems to protect the claims of defendants in criminal cases. *A government that fails to protect both the rights of accused persons and also all other people has failed in its mission.* (Emphasis added).

67 A.B.A.J. 292 (1981).

Without minimizing the need to secure a defendant's presence at trial, *amici* urge that sole reliance on this function as the basis for bail would foster a situation where the defendant who aggravates his initial charge by merely forgetting or misconstruing his court date would be incar-

cerated pending trial, while a defendant who repeatedly aggravates his initial charge by going on a crime spree, yet continues to faithfully appear before the court, would be free to continue his illegal activities, at least until the time of a conviction. We submit that our jails are not more suitably used for protecting us from the confused or absent minded defendant who fails to appear, rather than those who pose a significant and on-going threat to the safety and security of our citizens through their continuing criminal conduct.

An additional consideration of the misconception that pretrial release is solely for the purpose of assuring the defendant's appearance at trial is the effect that such a view has on deterrence of crime. When a dangerous defendant is released on bail, he is not only placed in a position enabling him to commit further crimes, but he is in a position to do so without any significant threat of further sanctions. Chief Justice Burger took a practical view of this when he stated:

> It is clear that there is a startling amount of crime committed by persons on release awaiting trial, on parole, and on probation release. It is not uncommon for an accused finally to be brought to trial with two, three, or more charges pending. Overburdened prosecutors and courts tend to drop other pending charges when one conviction is obtained. Should we be surprised if the word gets around in the "criminal community" that you can commit two or three crimes for the price of only one and that there is not much risk in committing crimes while awaiting trial? (footnote omitted).

67 A.B.A.J. 292 (1981).

Our system of criminal justice is founded in large part on the concept of deterrence. Considerations which subvert that concept greatly undermine any potential for effective law enforcement. Bail provisions which do not consider the government's responsibility of protecting its citizens readily fall into this category. Yet until recently the bail

provisions of the various states and the federal government have been almost exclusively of the assurance type, rather than deterrence type.

We applaud the role of the Bail Reform Act of 1984 in reversing this emphasis - or at least restoring a proper balance that takes into consideration the concerns of the law-abiding – and in encouraging the states to adopt more balanced bail provisions. Our constituencies are of the firm belief that preventive detention has effectively *reduced crime in our communities.*

Even when assurance-type bail provisions were the nearly-exclusive model for bail statutes, it was acknowledged that common practice allowed the setting of high bail for defendants who were believed to be of significant danger to the community, regardless of the likelihood of the defendant's appearing at trial. See U.S. Dept. of Justice, *Proceedings and Interim Report of the National Conference on Bail and Criminal Justice,* (1965); *Footnote to Furman: Failing Justification for the Capital Case Exception to the Right to Bail After Abolition of the Death Penalty,* 10 San Diego L. Rev. 349 (1973); and *Forcible Rape and the Right to Bail,* 17 San Diego L. Rev. 1061, 1068 n. 37 (1980).

The American Bar Association several years ago aptly identified the conflict inherent in a legal framework that formally provides only the assurance-type of bail provisions, but which, by necessity, practices deterrence as well. The commentary to the ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release (1968) stated:

> It is no secret that many judges when faced with a defendant whom they fear will commit "additional crimes" if released, feel compelled to set bail beyond his reach. In effect, bail is used to deny rather than to facilitate pretrial release . . . So-called preventive detention should be dealt with openly and on its own merits, not masked behind

manipulation of bail amounts.

It therefore is imperative to acknowledge that pretrial release does have *two functions*, and that neither is to be subservient to the other. A government's responsibility must be extended to that of protecting its citizens and this must be balanced with the assurance of appearance at trial.

Additionally, *amici* note that the Attorney General's Task Force on Violent Crime-Final Report made a similar recommendation when it stated in 1981, "The Attorney General should support or propose legislation to amend the Bail Reform Act that would accomplish the following: (a) Permit Courts to deny bail to persons who are found by clear and convincing evidence to present a danger to particular persons or the community." 29 CrL 3133 (1981). Indeed, that is exactly what the Bail Reform Act of 1984 and similar provisions of the various states have done.

Amici submit, that in the final analysis the decision that a government makes concerning bail availability is a legislative/political statement of how best it can protect itself and its people from the predilections of dangerous and recidivist offenders. Other countries have had no difficulty in recognizing this essential nature of the bail question and have acted accordingly. For example, the English bail provisions contain these exceptions, *inter alia*, to the availability of bail in that country:

Exceptions to right to bail

2. The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would -

(a) fail to surrender to custody, or

(b) *commit an offence while on bail*, or

(c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

Bail Act of 1976, the Public General Acts and General Synod Measures, p. 1299 (London, H.M.S.O. 1976) (Emphasis added).

Other civilized countries similarly recognize the right of Society to protect itself through various forms of preventive detention. In Canada, "just cause" may be the basis for denial of bail, The Canadian Constitution of 1981, Part 1, Schedule B, Mobility Rights, subd. 11(e)("not to be denied reasonable bail without just cause"); in Japan, the practice is to detain offenders for reasons not related to guaranteeing their appearance in court in approximately 90 per cent of criminal cases, Terrill, World Criminal Justice Systems: A Survey, 276 (1984); in France, an offender who has previously been convicted of a felony or sentenced to jail for more than three months, may be denied bail as "an exceptional measure," Terrill, p. 146; in Sweden, there simply is no constitutional right to be released on bail, although the Swedish Code of Judicial Procedure allows the courts, *the prosecutor, or police* to substitute travel restrictions for detention while awaiting trial; violation of travel restrictions can lead to arrest and detention, Terrill, p. 207.

These sample provisions, all of which are based on the principle of preventive detention, are illustrative of a free Society's inherent legislative/political right to protect itself. The Bail Reform Act of 1984 provides a reasonable balance to individual rights and the interests of Society. The Act provides an overlay of procedural protections well-suited to avoid arbitrary use of preventive detention or abuse of judicial discretion. *Amici* respectfully request, on behalf of our law enforcement constituency, that these reasonable provisions be upheld so that the statutory and state constitutional amendment process that has begun in our country can continue. **In our considered view, no single measure in criminal justice today holds greater promise for cutting the rates of crime in America than pre-trial preventive detention of dangerous offenders and recidivists.**

CONCLUSION

Amici respectfully request this Court to (1) reverse the decision of the court below on the basis of law and sound judicial policy, and (2) declare that bail provisions that take into consideration the safety and well-being of the community are constitutional and comport with sound public policy.

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No. 86-87

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY SALERNO AND VINCENT CAFARO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Respondent

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 4,500 lawyers, including representatives of every state. The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence, and expertise of defense lawyers.

Among the NACDL's objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, the NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and

procedures. A cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional right to bail as provided by the Eighth Amendment. The NACDL is very concerned about any decision that would undermine this constitutional guarantee, as would adoption of the position taken by the petitioner in the instant case.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers throughout the nation that the NACDL should offer its assistance to the Court.

The NACDL has obtained the consent of all parties to the filing of this brief: Solicitor General Charles Fried on behalf of petitioner, the United States of America; Anthony M. Cardinale

on behalf of respondent Anthony Salerno; Steven K. Frankel on behalf of respondent Vincent Cafaro. Letters of consent are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The analysis of the Eighth Amendment contained herein is based on recent historical research which has never been considered by any court. That research demonstrates that at the time of the enactment of the Eighth Amendment, the Framers intended it to safeguard a substantive right to bail, guaranteeing pretrial release to all but those accused of capital offenses. Although the right to bail was guaranteed as early as 1682 in the Pennsylvania Frame of Government, it was still in its incipient stage when the Bill of Rights was passed. At that time only two

states guaranteed a right to bail in their constitutions. However, every state that entered the Union after 1789, with the exception of West Virginia and Hawaii, guaranteed a right to bail in its constitution. Moreover, during the nineteenth century, five of the original eleven states without a right to bail added explicit right to bail provisions in their bills of rights. With little variation these provisions all tracked the language of the Pennsylvania Frame of Government that "all prisoners shall be bailable by sufficient sureties unless for capital offenses, where the proof is evident or the presumption great." Finally, for nearly 150 years the right to bail has been viewed as a necessary feature of a criminal justice system which guarantees the accused the right to a fair trial. Because the

right to bail is crucial to the ability of the accused to mount an effective defense, it should not be abandoned except for the most compelling of reasons. While it may be necessary to dispense with this right where there exists a threat of imminent flight or danger to specific persons, the general threat to the community that the defendant might continue to engage in criminal activity is too speculative to overcome the defendant's interest in pretrial release.

The role that the Eighth Amendment plays in safeguarding our civil liberties cannot be overstated. From the Alien and Sedition Acts of 1799 to the Indian Removal Act of 1830, from the Palmer Raids of 1920 to the McCarran Act of 1950, our government has demonstrated a capacity for criminalizing conduct

which is now protected. Should this Court hold that the Eighth Amendment does not guarantee a substantive right to bail, that holding will not be limited to only the crimes which are presently listed in Section 3142(e). The right to pretrial release is instrumental in insuring that unconstitutional acts committed by our government do not go unchallenged; it must be preserved.

ARGUMENT

I

THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WAS INTENDED TO GUARANTEE THE RIGHT TO BAIL TO ALL BUT THOSE PERSONS ACCUSED OF CAPITAL CRIMES, THUS CONGRESS WAS WITHOUT THE AUTHORITY TO GRANT TO THE JUDICIARY THE POWER TO DENY BAIL TO PERSONS ACCUSED OF NON-CAPITAL OFFENSES

Whether the Eighth Amendment to the Constitution of the United States established an absolute right to bail has

been a subject of controversy since at least the mid-1960's. See Foote, "The Coming Constitutional Crises in Bail," 113 U. Pa. L. Rev. 959 (1965); Meyer, "Constitutionality of Pretrial Detention," 60 Geo. L. J. 1139 (1972); Duker, "The Right to Bail: A Historical Inquiry," 42 Alb. L. Rev. 33 (1977); Note, "The Eighth Amendment and the Right to Bail: Historical Perspectives," 82 Colum. L. Rev. 328 (1982); Carbone, "Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail," 34 Syracuse L. Rev. 517 (1983). The language of the Eighth Amendment is itself to blame for this controversy. Its first clause states only that "Excessive bail shall not be required. . . . " As Foote has noted, this language is susceptible to three interpretations:

that where a defendant is entitled to bail under an applicable statute a magistrate must not set bail in an excessive amount; that bail is not to be excessive where bail is found appropriate, but that a court has the authority to deny bail altogether; that defendants have an absolute right to be released on bail. Foote, supra at 969-70.

The dispute as to the intent of the Eighth Amendment has, until very recently, centered on the common law origins of bail. See Note, supra, Carbone, supra. We believe that this is a critical error of scholarship. As the following discussion will demonstrate, while the right to bail was not considered absolute in England, the Eighth Amendment was perceived at the time of its enactment, and for over a century

and a half thereafter, as guaranteeing to all those accused of non-capital offenses the right to be released on bail pending trial.

Later in this brief we will see why the Eighth Amendment must be perceived today as conferring a substantive right to bail. We will show that the Eighth Amendment's true role in the Constitution is to insure in peace time a method of preventing our democratic form of government from becoming despotic; it is no less than a fourth check in the checks and balances of our constitutional form of government.

A. The Origin of Bail

The system of bail, as it is known in the United States, is a direct descendent of a procedure employed in medieval England over a thousand years

ago. Then, as today, the local representative of the government, the sheriff, was responsible for the custody of prisoners awaiting trial. Because prison conditions were primitive and because prisoners would sometimes have to wait years for a traveling judge to hear their cases, sheriffs would frequently relinguish prisoners into the custody of a surety, usually a friend or relative of the accused, until trial. R. Goldfarb, Ransom--A Critique of the American Bail System 23-24 (1965).

By the Thirteenth Century, the abuse of this discretion had become widespread. Sheriffs would extort money from individuals who were entitled to be released on lesser bonds and would accept bribes from those who were not entitled to bail at all. In response to these abuses the First Statute of

Westminster, 3 Edw. 1, c. 15 (1275) was passed. It attempted to circumscribe the discretion of the sheriffs by delineating which offenses were bailable and which were not. Duker, supra at 45-46, Foote, supra, at 973; Meyer, supra at 1155.

In the Seventeenth Century the Crown found a way to circumvent the Statute of Westminster by ordering the arrest of individuals on unspecified charges. Without knowing the offense for which the person was accused, magistrates could not determine whether the person was entitled to bail. The Petition of Right, 3 Car. 1, c. 1 (1628) was intended to remedy this. It guaranteed Englishmen the right to notice of the charges against them. See Duker, supra at 58-66; Foote, supra at 966-67; Meyer, supra at 1180-85.

The Petition of Right, however, was ignored when it was in the interest of the King to do so. Failure of the Crown to obey the mandate of this legislation led in 1679 to the enactment of the Habeas Corpus Act, 31 Car. 2, c. 2 (1679). This Act established a mechanism of insuring executive compliance with the Petition of Right by requiring that persons arrested be brought before a magistrate. King James II however found a way to circumvent even this act. Judges subservient to the Crown would set prohibitively high bail, effectively preventing the release of prisoners thought to be a threat to the state. When James was overthrown, Parliament enacted the English Bill of Rights which stated in clause 10 "[T]hat excessive bail ought not to be required. . . " 1 W. and M., C. 36, Sec. 10 (1689). See

Duker, supra at 65-66; Foote, supra at 967; Meyer, supra at 1189-90.

There are two possible interpretations which can be drawn from the development of bail at common law. Duker and Meyer contend that in England bail was always a creature of statute; that it was never intended to be a substantive right. Duker points to the early colonial charters to argue that when the Colonists came to America they carried with them this principle, limiting the right to bail to specific offenses as did the Statute of Westminster. Duker, supra at 77-82. Moreover Meyer disputes Foote's contention that the Petition of Right was intended to establish an entitlement to bail. According to Meyer, the Petition of Right established the principle that the accused was entitled to notice of

the charges against him, a principle later embodied in the Sixth Amendment. Meyer, supra at 1190. That it arose in the context of an application for bail is, for Meyer, irrelevant. Meyer, supra, 1182.

This analysis however fails to consider the fact that each of these Acts, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights was the result of political repression. The Petition of Right of 1628 was forced upon King Charles following his imprisonment of five knights after they refused to make him a loan. Daniel's Case, 3 How. St. Tr. 1 (1627). The Habeas Corpus Act was forced upon Charles II following the arrest and imprisonment of Jenkes for inciting a riot. Although entitled to bail, no magistrate would set it.

Jenkes' Case, 6 How. St. Tr. 1189, 1208 (1676). The excessive bail clause was a response to the widespread practice of setting excessively high bonds for political opponents during the period immediately preceeding the Glorious Revolution. Foote, supra at 967.

What Duker and Meyer failed to appreciate was that each of these provisions was not merely a procedural amendment to the Statute of Westminster; rather they were the response of common men to decades of judicial and executive abuse of power. Each was in its own time a specific remedy to specific abuses; the English Bill of Rights was but the culmination of this process.

B. Bail in Colonial America

Probably the most significant development , one which has been for the most part ignored in the literature, was

the emergence in colonial constitutions and charters of specific provisions guaranteeing the right to bail in all but capital cases. See Note, supra at 351. If, as Duker and Meyer maintain, bail was never considered to be anything more than a creature of statute, one would expect state constitutions to either ignore the question of bail or go no further than the English Bill of Rights in prohibiting excessive bail. But something far more remarkable occurred.

In 1682, Pennsylvania provided in its Frame of Government "[t]hat all prisoners shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption great." Reprinted in 5 F. Thorpe, The Federal and State Constitutions, Colonial Charters and Other

Organic Law, 3061 (1906). When Delaware became a colony in 1702 it adopted the Pennsylvania Frame of Government, including this provision. Thorpe, supra at 557-58. With independence the State of Pennsylvania reincorporated this provision in its constitution, Pa. Const. ch. ii, Sec. 28 (1776), Thorpe, supra at 3089, and in 1776 North Carolina adopted an identical guarantee, N.C. Const. art. X (1776), Thorpe, supra at 2793. In 1777 Vermont added a similar provision to its constitution, Vt. Const. ch. II, Sec. 25 (1777). And in 1787 the Continental Congress provided in the Northwest Ordinance that "[a]ll persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great." Northwest Territory Ordinance of 1787, art. II, 1 Stat. 13. Two years

later Congress provided an explicit right bail in the first judiciary act: "And upon all arrests in criminal cases, bail shall be admitted except where the punishment may be death. . . " Judiciary Act of 1789, ch. 20, Sec. 33, 1 Stat. 73, 91.

While only two of the original thirteen states included an explicit right to bail in their constitutions, every state that entered the Union after 1789, with the exception of West Virginia and Hawaii, guaranteed a right to bail in its constitution. During the Nineteenth Century, five of the original eleven states without a right to bail added explicit right to bail provisions in their bills of rights. With little variation these provisions all tracked the language of the Pennsylvania Frame of Government, "all prisoners shall be

bailable by sufficient sureties unless for capital offenses, where the proof is evident or the presumption great." Note, supra at 351.

Critics of a substantive right to bail have no explanation for the recognition of such a right in state constitutions admitted prior to and following the enactment of the Bill of Rights. That such a guarantee would have been a significant departure from the common law is further evidence that the Eighth Amendment was itself intended to safeguard this right.

C. Bail as an American Institution

That the sole purpose of bail is to insure the presence of the accused for trial is well established. In Ex parte Milburn, 34 U.S. (9 Pet.) 704 (1835) Justice Story noted:

> A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and judgment of the court thereon. It is not designed as a satisfaction for the offense, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment which the law ordains for the offense.

Id. at 710. Justice Story's observation was endorsed by Justice Bradley in United States v. Ryder, 110 U.S. 729, 736 (1884): "the object of bail in criminal cases is to secure the appearance of the principal before the Court for the purpose of public justice." This principle was based on the theory "that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment. . . " Hudson v. Parker, 156 U.S. 277, 285 (1895). Reviewing the cases interpreting the

purpose of bail, Duker concluded that bail was always perceived as a device to insure the presence of the accused, not to prevent the commission of crime. Duker, supra, at 68-69.

Duker's conclusion is supported by overwhelming historical evidence. Those who have argued to the contrary rely on the fact that the Colonists granted their courts the discretion to deny bail to persons accused of capital crimes. See Mitchell, "Bail Reform and the Constitutionality of Pretrial Detention," 55 Va. L. Rev. 1223, 1230 (1969); Hruska, "Preventive Detention: The Constitution and Congress," 3 Creighton L. Rev. 36, 47 (1970); Meyer supra at 1162-63. But as Judge Newman pointed out in United States v. Melendez-Carrion, 790 F.2d 984, 998 (2d Cir. 1986), a number of crimes

considered capital offenses in early America were clearly of no danger to anyone. For instance, in Colonial Massachusetts, a child over sixteen who disobeyed his parents faced the possibility if a death sentence, while a person accused of arson, burglary, or robbery would not. See Note, supra at 348-349. Similarly, both larceny and counterfeiting were made capital offenses by the Federal Crimes Act of 1790, Ch. 9, 1 Stat. 12. Obviously it was the danger of flight and not the danger to the community which allowed judges to deny bail to those accused of these offenses.

The role of the Eighth Amendment in the defendant's ability to obtain a fair trial was explained by Chief Justice Vinson in Stack v. Boyle, 342 U.S. 1 (1951). According to Justice Vinson:

> This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See Hudson v. Parker, 156 U.S. 277, 285 (1895). Unless this right to bail is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Id. at 4.

Justice Jackson, in a concurring opinion joined in by Justice Frankfurter, wrote:

> Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.

342 U.S. at 7-8.

Critics of Stack have sought to distinguish the decision, arguing that the question before the Court was excessive bail, not the denial of bail. This distinction however ignores the reasoning of the justices, reasoning

which unquestionably applies to the entitlement to bail itself.

The government has cited dicta from this Court's decision in Carlson v. Landon, 342 U.S. 524, 545 (1951), for the proposition that the Eighth Amendment does not circumscribe the power of Congress to define the classes of cases in which bail is to be allowed. In Carlson, Congress granted to the Attorney General the power to order the detention of alien communists pending deportation proceedings. Under this statute the sole criterion for detention was membership in the communist party. It was not necessary for the alien to be charged with a crime, nor was it necessary for the alien to be considered a threat to the community or a risk of flight. If Carlson is not limited to alien deportation cases, then

our government has the power to order the detention of any person for any reason without offending the Eighth Amendment.

D. The Government's Argument

The government has craftily avoided the due process objections raised by Judge Newman in United States v. Melendez-Carrion, 790 F.2d at 1000, and repeated herein. United States v. Salerno, 794 F.2d 64, 72 (2d Cir. 1986). The government argues that the reason why persons are not confined beyond the length of their sentence is because "society has made the judgment that after a period of incarceration, those persons no longer pose an unacceptable risk of endangering the community." (Br. at 24). Moreover, the fact that detention is only permitted where an individual is charged with an

offense is sufficiently "reasonable" to satisfy due process even if detention of persons not charged with an offense would not be so reasonable. (Br. at 22).

The government's argument is tautological. That society has chosen not to incarcerate persons beyond the term of their sentence is not a reason why society could not choose to do so. The fact that Section 3142(e) comes into play only where an individual has been charged with an offense does not mean that a statute not so limited would be unconstitutional. It is easy enough to conceive of a regulatory measure intended to prevent future crimes where a prima facie case of guilt was established at trial but the jury nevertheless acquitted:

> If after considering the facts and circumstances presented at trial the court concludes that substantial evidence was presented demonstrating

> the defendant's commission of the offense and if the court concludes that the defendant remains a continuing threat to the community, the court may order the defendant detained at a behavior modification center as designated by the Attorney General until such time as the defendant is certified safe.

18 U.S.C. Sec. 3626 (2004).

Clearly, the interests promoted by the Eighth Amendment, in particular the ability of the accused to mount an effective defense, are not any less important simply because the government has characterized a defendant as a threat to the community. The government's argument, that these concerns are overridden by the state's interest in seeing that defendants do not commit more crimes while on bond, does not withstand close scrutiny. The attractiveness of the government's argument is derived from an equation that assumes a high degree of reliability in a court's

determination that a particular accused will commit a crime while on bond. As the testimony presented to Congress demonstrated, it is nearly impossible to predict which defendants will commit crimes while on pretrial release. Moreover, the percentage of those engaging in such conduct is often quite small. Testimony of Don M. Gottfredson, Dean, School of Criminal Justice, Rutgers University, Newark, N. J. , Bail Reform Act: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 98th Cong., 1st and 2d Sess. 55-56 (1984)(finding rearrest rates of from 5% to 20%); Malcolm Freeley, Professor, University of Wisconsin, Madison, Wisconsin, Id. at 119; D. Alan Henry, Director, Pretrial

Services Resource Center, Id. at 168-169; Ira Glasser, Director, American Civil Liberties Union, Id. at 238-241.

Thus the proper equation for this Court to consider is one which recognizes that society's interest in protecting itself against further crime is an unknown variable, one which may be large or small in a given case but which is never actually known. Against this unknown stands the accused, who may well be innocent, but whose ability to prove his innocence will depend on whether or not he can secure his release before trial.

E. Hard Cases

In his dissent in this case, Judge Feinberg contended that society must have a way of confining those who are so dangerous that their re-release into the general populace is virtually a death sentence on innocent life:

> [I]f a member of a terrorist organization is indicted for blowing up an airliner for political reasons and there is clear and persuasive evidence that the defendant will do so again if not confined, it is not self-evident to me that society must nevertheless immediately release him on bail until he is tried.

United States v. Salerno, 794 F.2d at 77. But the courts have always found a way to incapacitate the rabidly dangerous, usually by setting excessive bail. Carbone, supra at 546-47.

In the imperfect world in which we live there will always be people with whom our social and political institutions are incapable of dealing effectively. Traditionally we have dealt with such people by making exceptions to the general rules which are designed to safeguard our liberties. While the violation of a constitutional right should not be undertaken lightly, the fact that the Eighth Amendment has

had to be ignored on some occasions is no reason to abandon it.

II

THE EIGHTH AMENDMENT IS A FOURTH CHECK IN THE CHECKS AND BALANCES OF OUR CONSTITUTIONAL FORM OF GOVERNMENT, PROTECTING THE INDIVIDUAL FROM UNCONSTITUTIONAL ABUSES OF POWER

As the government's argument has so eloquently shown, due process has never been a very effective champion of our civil liberties. Due process allowed the internment of hundreds of thousands of innocent American citizens whose only crime was being of Japanese descent. Korematsu v. United States, 323 U.S. 214 (1944). Due process allowed the commitment of untold thousands of Americans deemed insane though they posed neither a threat to themselves nor anyone else. O'Conner v. Donaldson, 422 U.S.

563 (1975). Due process has even permitted the incarceration of persons who could not post peace bonds despite the fact that they had been acquitted of any crimes. Commonwealth v. Franklin, 172 Pa. Super. 152, 92 A.2d 272, 273 (1952)(citing data indicating that during the previous ten years 478 men, after acquittal on criminal charges, were compelled to serve an aggregate of over 600 years in prison for default on bonds totalling $613,200).

History has judged each of these examples as mistakes, if not worse, yet they are relied upon by the government to support its argument that pretrial detention is constitutional. What these examples actually demonstrate is that where human liberty is balanced against the felt needs of the time, our government has demonstrated a remarkable capacity for making the wrong choice.

It may be that we should not judge too harshly those who have had to make tough decisions during times of war. For that reason President Roosevelt's internment of the Japanese during the Second World War and President Lincoln's suspension of habeas corpus during the Civil War may be forgiven. But the exercise of such powers in times of peace must not be excused. For the exercise of such powers in times of peace threatens all our liberties. As Associate Judge Mack stated in his dissent in United States v. Edwards, 430 A.2d 1321, 1363 (D.C. 1981)(en banc), cert. denied, 455 U.S. 1022 (1982):

> Ironically enough, my concern is not with the constitutional rights of Marvin L. Edwards, who has entered pleas of guilty in both cases, and who is no longer being held under the detention statute he challenges. My concern is with MY constitutional rights for I, like millions of Americans have lived, for a time at least, believing that

> the United States Constitution prohibited my punishment for a crime until such time as I have been found guilty of committing that crime.

We need look no further than our own shores, our own history to see the kinds of abuses of power which the Eighth Amendment serves to prevent. In 1798 Congress, dominated by the Federalist supporters of President John Adams, passed the Alien and Sedition Acts. These Acts made it an offense to speak or write against the President or Congress "with the intent to defame" or bring "into contempt or disrepute." These Acts, directed against Jefferson and his supporters, were not mere words. They resulted in the imprisonment of Vermont Congressman Matthew Lyon for calling Adams a democracy-hating aristocrat, the imprisonment of Anthony Haswell for denouncing Lyon's prosecution, and David Brown for organizing a

protest demonstration, 3 P. Smith, The Shaping of America, 268, 281 (1980); S. Morison, The Oxford History of the American People, 353-54 (1965); C. Goodell, Political Prisoners in America, 36 (1973). Obviously these Acts were motivated soley for partisan political reasons and criminalized conduct which we recognize today as protected.

Another example of repression is illustrated by our government's treatment of the American Indian. The Indian Removal Act of 1830 was the first legistrative departure from the United States policy of respecting the rights of American Indians. It authorized the wholesale removal of tribes from their territory to western prairie land. The Act authorized President Andrew Jackson to exchange prairie land for the more desirable Indian territory within the

state borders in the Southeast. By the mid-1830's, rapid settlement of the land east of the Mississippi made it clear that the government would not tolerate the presence of even peaceful Indians. Although the Act provided only for the negotiation of treaties, it was used to justify the forceful removal of Indians to gain compliance. Many northern tribes complied with removal and resettlement to western lands but southeastern tribes (the Five Civilized Tribes) resisted. Many of these Indians had homes, representative government, children in missionary schools, and trades. Under the auspices of the Removal Act of 1830, some 100,000 tribesman were forced to march westward under United States military coercion. Up to 25% of these Indians, many in manacles, perished while en route. In

the years that followed, Congress passed nearly a dozen acts that made it possible to detain Indians as virtual prisoners on their own reservations. W. Brandon, The Last Americans, 272 (1974); 6 New Encyclopedia Britannica 290 (15th Ed. 1986).

Such acts of repression have continued into the 20th Century. When President Woodrow Wilson took America into the First World War he silenced all opposition to his policies with the Espionage and Sedition Acts. These laws punished by up to twenty years in prison persons who uttered "disloyal or abusive" language about the government, the flag or the uniform. Over 1500 prosecutions were instituted under these laws. One film maker was sent to jail for ten years for making a film on the American Revolution because it was

feared it might encourage anti-British sentiment, a Vermont minister was sentenced to fifteen years imprisonment for citing Jesus as an authority for pacifism, and South Dakota farmers were sent to jail for petitioning for a referendum on the war. 2 S. Morison, H. Commager, W. Leuchtenburg, The Growth of the American Republic, 384 (7th Ed. 1980); Goodell, supra at 57-60. After the war, Attorney General A. Mitchell Palmer ordered J. Edgar Hoover to conduct raids in thirty cities against suspected radicals. These raids resulted in the arrest of over 4,000 persons, some of whom were held incommunicado for weeks. Morison, supra at 410; Goodell, supra at 82-83. One of those later added to Hoover's list of suspected subversives was a lawyer named Felix Frankfurter. F. Donner, The Age of Surveillance, 147n. (1980).

After the Second World War the threat of Communist subversion loomed again, resulting in the passage of the McCarran-Nixon Internal Security Act of 1950. This Act, passed over Truman's veto, permitted the internment in concentration camps of subversives during a time of "national emergency." Morison, supra at 634; D. Caute, The Great Fear, 37-38 (1978). The fear that had swept the country at this time is reflected in the statement made by the federal judge who denied bail to the aliens detained in Carlson v. Landon, 342 U.S. at 550, "I am not going to turn these people loose if they are Communists, any more that I would turn loose a deadly germ in this community." As Justice Black noted in his dissent in Carlson, one of these germs, Mr. Zydok, had lived in the United States for thirty-nine years,

owned his own home, sold $50,000 worth of U.S. war bonds, gave blood to the Red Cross seven times during the war and had sons who served in the American Army during the war. Id. at 549-50. More recently, when over 500,000 people marched on Washington to protest the expansion of the Vietnam War into Cambodia, Attorney General John Mitchell ordered the police to make mass arrests in the name of national security. This action was later held to have been illegal. J. Archer, Police State, 153 (1977).

Although Section 3142(e) is directed at traditional criminal conduct, a decision by this Court upholding the constitutionality of pretrial detention could not be so limited. As we have seen, the government's due process argument would apply

with equal force to permit detention after acquittal, upon completion of a term of imprisonment, and, the government's protestations notwithstanding, even where no crime has yet been charged. Even if these scenarios seem implausible, the history of our nation demonstrates Congress's willingness to denominate as criminal, conduct which at present is considered protected. Sometimes these Acts have been declared unconstitutional, and sometimes not. But the right to release while such Acts are being challenged is a significant safeguard, one which is fundamental to our democratic form of government.

CONCLUSION

For all the foregoing reasons, the decision below should be affirmed.

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No. 86-87

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED STATES OF AMERICA,
Petitioner,

v.

ANTHONY SALERNO and VINCENT CAFARO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-67

UNITED STATES OF AMERICA,
Petitioner,

v.

ANTHONY SALERNO and VINCENT CAFARO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AMICUS CURIAE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The Public Defender Service is an agency of the District of Columbia established to represent indigent persons charged with crimes in the United States District Court and the Superior Court for the District of Columbia. 1 D.C. Code § 2701 *et seq.* (1981). As counsel for a large proportion of those accused of serious crimes in the Superior Court, the Public Defender Service has acquired considerable experience with the practical operation of

the preventive detention statute, 23 D.C. Code § 1322 (1981), which provided the blueprint for the federal law now under consideration by this Court, and with the devastating effect of preventive detention upon the rights of the accused.

Preventive detention is new to the federal system, but it has been authorized by statute in the District of Columbia since 1970. 84 Stat. 644, Pub. L. 91-358. In considering the bail reform legislation which resulted in 18 U.S.C. § 3142(e), Congress relied heavily upon testimony and data drawn from the District's experience, and upon the reasoning of the District of Columbia Court of Appeals upholding the preventive detention law. *Edwards v. United States*, 430 A.2d 1321 (D.C. 1981) (*en banc*), *cert. denied*, 455 U.S. 1022 (1982). Our experience is therefore directly relevant to the factual and legal premise of Section 3142(e).[1]

SUMMARY OF THE ARGUMENT

We agree with the court below, and with the Respondent, that preventive detention is contrary to fundamental constitutional principles regardless of the procedures adopted to make detention decisions in particular cases. Our brief, however, will address a second aspect of the facial validity of Section 3142(e): whether the statute is capable of being interpreted and applied so as to provide sufficient protection against the wrongful pretrial detention of innocent and nondangerous persons to satisfy the due process clause of the Fifth Amendment.?[2] Section 3142(e) provides even less protection against erro-

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[1] The parties have consented to the filing of this Brief. Letters of consent have been filed with the Clerk. Supreme Court Rule 36.2.

[2] This Court need not reach the procedural issue, which was not squarely considered below. *See Schall v. Martin*, 467 U.S. 253, 274 n.24 (1984) (court below intimated that it would reach same result on procedural grounds).

neous and prolonged incarceration before trial than its model, 23 D.C. Code § 1322. We believe the lesson to be drawn from the District of Columbia's experiment with preventive detention is that the government's "regulatory" power to detain persons accused of crime solely because they are believed to be dangerous, may be exercised, if at all, only with the most scrupulous regard for the liberty interests of the accused. This brief outlines the minimal procedural safeguards our experience shows are necessary to ensure that these determinations are fair and accurate.

The principles which must guide this Court's analysis of the procedural mechanism Section 3142 creates are straightforward and not in dispute. The issue is "whether the procedural protections embodied in the pretrial detention provisions provide 'sufficient protection against erroneous and unnecessary deprivations of liberty.'" Brief for the United States (Pet. Br.) at 35, *quoting Schall v. Martin*, 467 U.S. 253, 274 (1984). There are two types of error which must be avoided: the detention of persons innocent of the crime of which they have been accused, regardless of their supposed dangerousness, and the detention of nondangerous persons, regardless of their guilt. Section 3142 fails to provide essential safeguards against these errors, although the government has no legitimate interest—"regulatory" or otherwise—in imprisoning the innocent and nondangerous.

Perhaps the most significant shortcoming of the federal law is that the factual showing of guilt the government must make to justify pretrial detention is no greater than the showing required to support an arrest. This flaw results from congressional reliance on *Edwards*, which applied Fourth Amendment principles rather than this Court's extensive procedural due process jurisprudence. This Court's due process decisions make clear that the standard of proof required to support the deprivation of the liberty interest at stake here is clear and convincing

evidence, not the minimal showing of probable cause which suffices under the Fourth Amendment. Even if this alone were insufficient to doom Section 3142(e) under the due process clause, the statute also omits other important safeguards crucial to the protection of the fundamental liberty interest at stake here. The defendant is denied notice of the specific allegations relied on to prove dangerousness and the right to confront adverse witnesses. *See Black v. Romano*, 471 U.S. 606, 612 (1985) (procedural safeguards in probation revocation hearing). Moreover, in contrast to the District of Columbia statute, Section 3142(e), read in conjunction with the federal Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, does not adequately limit the duration of the confinement and loss of liberty to which a federal defendant is exposed.

ARGUMENT

SECTION 3142 VIOLATES DUE PROCESS BECAUSE IT PROVIDES INADEQUATE SAFEGUARDS AGAINST ERRONEOUS DETENTIONS

The Bail Reform Act of 1984 was, as Congress recognized, a "significant departure" from American tradition. "Comprehensive Crime Control Act of 1983," S. Rep. 98-225, 98th Cong., 1st Sess. 3 (1983). As this Court explained in *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citation omitted):

> This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured after centuries of struggle, would lose its meaning.

Until the enactment of the District of Columbia preventive detention statute in 1970, the suspected dangerous-

ness of a person accused of a crime was not a legitimate [3] consideration in the setting of pretrial release conditions.[4]

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[3] The Bail Reform Act of 1984 was intended, in part, to remedy the covert practice of detaining those suspected of dangerousness by setting money bonds in an amount higher than required to assure the defendant's appearance at trial. S.Rep. 98-225 at 5, 11. Because the Act retains the use of money bonds, however, the Bail Reform Act allows this practice to continue, so that "dangerous" persons may still be detained without resort to the statutory preventive detention procedures, and in cases where the showing required by the statute cannot be made.

[4] This case does not present the broader question, whether a court may take dangerousness into account in setting release conditions. Consequently, this Court could strike down Section 3142(e) without invalidating alternative bills proposed in Congress which would allow dangerousness to play a part in the release decision without authorizing preventive detention. *E.g.*, House Rep. 98-1121 60 (1984) (additional views of Rep. Kastenmeier, explaining proposed substitute). *See* ABA Standards, *Pretrial Release*, 10-5.9 (b)(ii)(A), (B) (2d ed. 1980) (the ABA in 1985 revised its Standards to endorse limited preventive detention following a more extensive hearing than is permitted under 18 U.S.C. § 3142); Hearings before House Subcommittee on Crime House Judiciary Committee, 97th Cong., 1st Sess. 66-70 (1982) (testimony of Judge Sylvia Bacon, D.C. Superior Court) (ABA "does not favor the use of preventive detention based solely upon a defendant's past conduct as upon a general prediction of future dangerousness" although it does favor consideration of dangerousness); Hearings before Senate Judiciary Committee, 97th Cong., 1st Sess. 11889-90 (1983) (same); Hearings before Senate Judiciary Committee, 96th Cong., 1st Sess. 10328 (1979) (testimony of Prof. Dershowitz), 10340 (testimony of Bruce Beaudin, then director of D.C. Pretrial Services Agency); 10912 (letter Prof. William Greenhalgh to Sen. Kennedy stating ABA position); Hearings before Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Judiciary Committee, 97th Cong., 1st & 2d Sess. 84, 95 (1983) (testimony of Judge Tjoflat); 129 (testimony of Prof. George, stating ABA position). Nor does this case require the Court to address the constitutionality of statutes which permit detention of a defendant who has violated a specific condition of release, such as an instruction not to violate any law. *See, e.g.*, ABA Standards, *Pretrial Release*, 10-5.4(b)(i) (revised 1985).

The presumption of innocence carried with it a presumption of freedom from the loss of liberty and stigma associated with a criminal conviction. In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court held that the presumption of innocence does not limit the conditions of confinement which may be imposed upon pretrial detainees. *Wolfish* does not address the question presented here: whether the government may curtail the fundamental liberty interest of a presumptively innocent person accused of a crime on the grounds of future dangerousness? *See Wolfish*, 441 U.S. at 534 n.15.

The government asks the Court to write the whole issue of innocence out of its analysis of preventive detention by asserting an expansive "regulatory" power to imprison for suspected future dangerousness alone. Pet. Br. at 11. But if a person innocent of wrongdoing could be imprisoned solely because of likely future misconduct, all of the constitutional protections now available to criminal defendants would be surplusage;[5] rarely would the government seek to prove guilt beyond a reasonable doubt

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[5] This is especially true because of the breadth of the term "safety of the community." For example, this Court has held that a non-violent petty theft is "dangerous" conduct for purposes of involuntary commitment of an insanity acquittee to a mental hospital. *Jones v. United States*, 463 U.S. 354, 365 n.14 (1983). Imprisonment of the dangerous would eviscerate not only the procedural safeguards in the Bill of Rights, but the principle of legality which constrains the exercise of the state's ultimate coercive power. An individual would have no way to be sure his or her future conduct would not be deemed dangerous. Nor would a judge have a sufficient basis for deciding which persons are dangerous and which are not. *See Connally v. General Construction Co.*, 269 U.S. 385, 395 (1926); *Winters v. New York*, 333 U.S. 507 (1948). Fair notice and the control of arbitrariness are the two fundamental objectives of the void-for-vagueness doctrine. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Whether imprisonment can be based solely on "dangerousness" is a different question than whether this factor can play a part in sentencing the convicted, for example, as a "dangerous special offender" under 18 U.S.C. § 3575. *See Schall v. Martin*, 467 U.S. at 278 n.30.

when it could incapacitate a citizen by establishing a risk of future harm to the community in a civil regulatory proceeding. Our constitutional heritage does not support the government's radical claim of such sweeping police power. *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944), reflect at best the ease with which such an all-encompassing regulatory power may be abused.[6] Indeed, Congress has not authorized regulatory detention based only on predicted criminality. Congress believed, however, that there exists a "small but identifiable" segment of the population whose members are both guilty of past criminal conduct and likely to be dangerous. S. Rep. 98-225 at 6-7.

We agree with the Court of Appeals below, that the imprisonment of this "small but identifiable" segment before trial violates our fundamental law because the government cannot show a compelling interest in detention which overcomes the citizen's fundamental interest in "[l]iberty from bodily restraint" *Greenholtz v. Nebraska Inmates*, 442 U.S. 1, 18 (Powell, J., concurring in part

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[6] New evidence has shown that the fears which inspired the decision to detain Japanese-Americans were exaggerated. *Hohri v. United States*, 782 F.2d 227 (D.C. Cir. 1986), *cert. granted on other grounds*, —— U.S. —— (Nov. 17, 1986). The same is true of the evidence supporting the preventive detention legislation at issue here. As Senator Ervin wrote, "Preventive detention legislation is an illustration of what happens when politics, public fear, and creative hysteria join together to find a simple solution to a complex problem." "Foreword: Preventive Detention—A Step Backward for Criminal Justice," 6 Harv. C.R.-C.L. L.Rev. 291 (1971). Just as subsequent evidence has undermined the premise of the order for the detention of Japanese-Americans during World War II, studies have shown that the "alarming problem" of crime committed by persons on pretrial release was not, as Congress apparently thought in 1970, due to the liberal release provisions of the 1966 Bail Reform Act. Rather, it reflected national trends in crime and demography. Roth & Wice, "Pretrial Release and Misconduct in the District of Columbia," ["INSLAW Study"] 3 (1980).

and dissenting in part). But even if the long tradition described in *Stack v. Boyle* does not absolutely bar preventive detention, it does warrant this Court in scrutinizing the Bail Reform Act with scrupulous care.[7] Judged by any standard, Section 3142 deprives pretrial detainees of their liberty without due process of law.

A. The Framework

For over a decade, this Court has consistently followed the analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

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[7] The government argues, and we agree, that this Court generally owes a large measure of respect to decisions by the legislative branch. Pet. Br. at 15. This restraint must be balanced in this case, however, by a vigilance for the rights of citizens who lack a meaningful voice in the legislative process. A higher level of scrutiny is also appropriate here because the legal basis for Section 3142(e) is a court decision which this Court has not reviewed. *See* S. Rep. 98-225 at 8 (discussing significance of *Edwards*). Since *Edwards*, we submit, was wrongly decided on several important points, the entire statute is based upon a faulty judicial premise rather than independent congressional judgment. Finally, Congress relied upon two empirical studies concerning pretrial recidivism to support its view that this small group of dangerous criminal defendants was also "identifiable." S. Rep. 98-225 at 6 nn.14, 15. These studies prove the opposite. They show, as do other studies, that predictions of dangerousness are extremely unreliable, and that any rule for detaining dangerous persons before trial will necessarily entrap many other nondangerous and presumptively innocent persons. Ewing, *"Schall v. Martin*; Preventive Detention and Dangerousness Through The Looking Glass," 34 Buff. L. Rev. 173, 181-196 (1985) (surveying studies); Note, Preventive Detention: An Empirical Analysis 6 Harv. C.R.-C.L. L. Rev. 298, 314 (1971).

> substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

The government agrees that *Mathews*' due process analysis is appropriate. Pet. Br. at 35-36. Congress, however, relied on the District of Columbia Court of Appeals decision in *Edwards*, which, in turn derived its procedural standard from *Gerstein v. Pugh*, 420 U.S. 103 (1975), rather than from this Court's due process decisions.

In *Gerstein*, this Court held that before a person accused of a crime may be detained pending further judicial proceedings, a neutral and detached magistrate must find probable cause to believe that he or she committed the offense charged. The only issue decided in *Gerstein* was what the Fourth Amendment required in order to continue the warrantless seizure of a person past the initial appearances before a magistrate. *Gerstein*, 420 U.S. at 125 n.27. *Gerstein* does not purport to decide what protections the Due Process Clause requires before an individual may be deprived of liberty on the basis of an asserted government interest in preventing dangerousness.[8]

The *Gerstein* standard is the same "practical, common sense decision" *Illinois v. Gates*, 462 U.S. at 238,[9] which

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[8] *See United States v. Edwards*, 430 A.2d at 1336-37. Judge Ferren made this point in his dissent, *id.* at 1353-54. In *DeVeau v. United States*, 454 A.2d 1308, 1315 (D.C. 1982), a panel of the same court relied on *Edwards* for the proposition that "if a process is adequate for Fourth Amendment purposes, there is no reason why it should not be adequate for Fifth Amendment purposes."

[9] This Court's recent decisions in *Illinois v. Gates*, 462 U.S. 213 (1983) and *Massachusetts v. Upton*, 466 U.S. 727 (1984) reduce the government's burden in showing probable cause to support an arrest or search warrant and cast additional doubt on the ade-

governs issuance of arrest warrants, and determines whether a person may be held for trial. This Court need not decide whether *Gerstein's* Fourth Amendment holding also satisfies the requirements of the Due Process Clause to justify pretrial detention on the basis of risk of flight.

Detention under Section 3142 is a different matter entirely. The government asserts the authority to detain not by necessary implication from its power to bring an individual to trial, but under a general "regulatory" power to detain.[10] By definition, the constitutional issue here does not arise when an individual is unlikely to appear and may be detained for that reason. Therefore, the government's weighty interest in obtaining a determination of guilt or innocence cannot be used to justify detention under Section 3142. *Gerstein* cannot supply the measure of the process which is due; yet *Gerstein* is the only process which Section 3142 provides to protect against detention of an innocent person.

Schall v. Martin, 467 U.S. 253 (1984) applied the *Mathews v. Eldridge* calculus to a New York statute authorizing the brief detention of juveniles charged with acts of delinquency rather than relying exclusively on Fourth Amendment standards derived from *Gerstein*. *Schall* did not place this Court's imprimatur on preventive detention in every form;[11] indeed, *Schall* itself illus-

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quacy of a *Gerstein* proffer to satisfy the requirements of due process in a preventive detention hearing.

[10] Since the United States does not have a general "police power," any "regulatory" detention must be related to some specific power or function of the federal government. *See Greenwood v. United States*, 350 U.S. 366 (1956); *United States v. Perry*, 788 F.2d 100, 109-11 (3d Cir. 1986). This distinction also differentiates preventive detention of the supposedly dangerous from the detention of those who pose specific threats to evidence or witnesses, *see Carbo v. United States*, 82 S.Ct. 662 (1962) (Douglas, Cir. J.) or mentally incompetent defendants pending trial. *Greenwood, supra.*

[11] In *Schall* itself, the Court said, "[i]t may be, of course, that in some circumstances detention of a juvenile would not pass constitu-

trates why the minimal safeguards available under Section 3142 cannot satisfy the due process clause. The liberty interest of the juvenile respondents in *Schall* was slight in comparison to the interests of the adult criminal defendants detained under Section 3142. Unlike a juvenile, an adult is not "always in some form of custody." *Schall v. Martin*, 467 U.S. at 265 Detention is not limited, as it was under the statute at issue in *Schall*, to a maximum of seventeen days. 467 U.S. at 270. Nor, in the case of adults, can the state's *parens patriae* interest add weight to the government's side of the scales as it did in *Schall*. 467 U.S. at 271.

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tional muster." 467 U.S. at 273. In contrast to the broad support of preventive detention for juveniles noted in *Schall*, only four states and the District of Columbia permit preventive detention of adults solely on the basis of predicted future behavior. *See* Ariz. Const. art. II, § 22(3); Ariz. Rev. Stat. Ann. § 13-3961B (Supp. 1985); Cal. Const. art. I, § 12(b); D.C. Code § 1322; Code of Va. § 19.2-120(2); Wisc. Stat. Ann. § 969.035(2), (6). Two states permit preventive detention of adults based upon future dangerousness only when the defendant has previous charges or convictions. *See* Colo. Const. art. II, § 19(b); Fla. Const. art. 1 § 14; Fla. Stat. Ann. § 907.041(4). Ten other states authorize pretrial detention when the defendant is accused of committing or previously has been convicted of certain serious (non-capital) offenses. *See* Ga. Code Ann. § 17-6-1(b)(1)-(2) (Supp. 1986); Haw. Rev. Stat. § 804-3(b) (Supp. 1984); Ill. Rev. Stat. ch. 38 para. 110-4(a); Mich. Const. art. I, § 15; Neb. Const. art. 1, § 9; Nev. Rev. Stat. §§ 178.484 *et seq.*; N.M. Const. art. II, § 13; Ore. Const. art. I, § 14; Ore. Rev. Stat. § 135.240(2); R.I. Const. art. 1, § 9; R.I. Gen. Laws § 12-13-1.1; Tex. Const. art. I, § 11a. Certainly, "[t]he fact that a practice is followed by a large number of states is not conclusive in a decision as to whether the practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Schall*, 467 U.S. at 268, *quoting*, *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The absence of a comparable consensus in support of preventive detention of adults argues against its validity.

As the Court recognized in *Schall*, the proper analysis is that set out in *Mathews v. Eldridge*. When the *Mathews* test is applied to the preventive detention of adults authorized under Section 3142, the balance of interests necessarily is different from that struck by the Court in *Schall*. Accordingly, we turn now to a discussion of those interests.

B. The Interest of the Accused

The foremost interest of a person accused of a crime is in retaining his freedom of movement before trial. For the innocent, especially, but for every person accused of a crime, the time before trial is a period of intense emotional strain, when the support of family and friends is badly needed. Imprisonment cuts the accused person off from all that makes his life meaningful, and places him in an often frightening and demeaning environment.[12] For a person who has never been in prison before, pretrial detention may be the first step in the "hardening" process which produces career criminals.[13] "Lengthy exposure to these conditions 'has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult.'" *Barker v. Wingo*, 407 U.S. 514, 520 n.12 (1972).

A pretrial detainee is likely to lose his job and livelihood, which will adversely influence his future in two distinct ways. First, it will make him a worse candidate for probation if convicted, because he no longer has a source of income or as stable a base in the community as he did before he was arrested. The loss of employ-

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[12] *Bell v. Wolfish* upheld prison regulations restricting visits and receipt of publications, and allowed double bunking and body cavity searches.

[13] A person with no prior criminal record may well be detained if charged with a drug or weapons offense resulting in a presumption under 18 U.S.C. § 3142(e) that no conditions of release will assure the safety of the community.

ment may impair an accused person's ability to prepare a defense, since the loss of income limits his or her ability to hire an attorney and to pay the necessary costs of investigation, expert witnesses, laboratory analysis, and the like. Pretrial imprisonment may also have a more direct effect on the ability to prepare a defense. *See Barker v. Wingo*, 407 U.S. at 533, & n.35. A client who is imprisoned is unable to assist counsel in gathering evidence and identifying potential witnesses. Not infrequently, clients will know of witnesses by sight or nickname. Without a client's assistance, these witnesses—who are essential to the presentation of the defense—cannot be located. The dramatic effects of pretrial incarceration on both conviction rates and sentencing has been documented in numerous studies, which demonstrate that the loss of liberty before trial is strongly correlated to the loss of liberty after trial.[14]

In addition to his loss of physical liberty, and concomitant isolation from family, friends, work, and his counsel, the accused person who is detained under Section 3142 suffers a devastating loss of reputation as well. This Court has recognized that the stigma of a label such as "mentally ill" is a factor to be considered in weighing the individual's liberty interest. *In re Winship*, 397 U.S. 358, 363 (1969) (state must prove juvenile's guilt beyond a reasonable doubt "both because of the possi-

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[14] Wald, "Pretrial Detention and Ultimate Freedom: A Statistical Study" 39 N.Y.U. L. Rev. 631 (1964). U.S. Dept. of Justice, Bureau of Justice Statistics, Pretrial Release and Misconduct 5 (1985). Attorney General's Committee on Poverty and The Administration of Criminal Justice "Poverty and The Administration of Federal Criminal Justice," *reprinted in part* in "Hearings before Subcommittee on Constitutional Rights, Senate Judiciary Committee, 88th Cong., 2d Sess. 218-220 (1964); Rankin, "The Effect of Pretrial Detention," 39 N.Y.U. L. Rev. 641 (1964); Ares, Rankin & Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole," 38 N.Y.U. L. Rev. 67 (1963).

bility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction"); *Addington v. Texas*, 441 U.S. 418, 426 (1979); *Vitek v. Jones*, 445 U.S. 480, 488 (1980). To be labeled a member of the "small but identifiable group of particularly dangerous defendants" is stigmatizing to a degree completely independent of any loss of reputation from the criminal charge itself.[15] The accused therefore has a greater interest in avoiding preventive detention than he does in being free from pretrial detention of comparable length to prevent flight.[16]

The individual's liberty interest in avoiding detention increases with the duration of pretrial incarceration. Under Section 3142, detention lasts far longer than the maximum of seventeen days possible under the statute this Court considered in *Schall*.[17] The "costs" of an erroneous

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[15] There is certainly reason to believe that this labelling process will also have an independent adverse effect on the defendant in sentencing, if he is convicted.

[16] *Vitek v. Jones* illustrates why *Gerstein* cannot provide the standard of proof in a preventive detention case. In *Vitek*, the Court held that additional process was required before a convicted prisoner could be transferred from a state prison to a state mental hospital. *Vitek* upheld a District Court injunction requiring a pre-transfer hearing, with notice, an opportunity to prepare, an independent decisionmaker, counsel, a right to confront and cross-examine witnesses except for good cause, a right to present witnesses, and written findings. 445 U.S. at 494-95. Thus, even if an accused person were detained under *Gerstein* in lieu of bond, additional process would be due before that person could be "transferred" to preventive detention. *Cf.* ABA Standards, *Pretrial Release*, 10-5.4(b)(i)(B) (additional procedures required for detention of person already held because of risk of flight).

[17] The Administrative Office of the Courts has collected statistics which reflect the total number of detention hearings in reporting districts (10,209 as of October, 1986), and the number of persons detained (7,841). These data reflect only 63 of 92 judicial districts. No separate statistics are kept on the average length of detention

determination are commensurately greater. Congress rejected proposals to adopt a specific time limit for detention under Section 3142,[18] comparable to those enacted in the District of Columbia and other states allowing detention on the basis of predicted dangerousness.[19]

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of those detained under Section 3142(e). Telephone conversation with Mr. Guy Willets, Chief, Pretrial Services Branch, Dec. 4, 1986.

Cases such as *United States v. Salerno*, 794 F.2d 64 (2d Cir. 1986) and *United States v. Melendez-Carrion*, 790 F.2d 984 (2d Cir. 1986), reflect the fact that prosecutions resulting in preventive detention are often complex and unlikely to be resolved without significant exclusions of time under the Speedy Trial Act. 18 U.S.C. § 3161(h). *See United States v. Colombo*, 777 F.2d 96, 100-101 (2d Cir. 1985). Although Congress recognized that under the Speedy Trial Act in theory cases come to trial within ninety days after arrest, *see* Sen. Rep. No. 98-225 at 22 n.63, excludable time may prolong pretrial detention for a year or more.

[18] As Senator Mitchell, the former United States Attorney for Maine, noted, the District of Columbia Court of Appeals in *Edwards* viewed 'the sixty day time limit as an integral part of the circumstances in which preventive detention does not contravene constitutional guarantees." 130 Cong. Rec. S938 (Feb. 3, 1984) (remarks of Sen. Mitchell). In the absence of such a provision, "we run the risk of having many Americans in jail who have not been convicted of anything, who are not in fact guilty of anything, and without any standard limit on their detention." *Id.* at S939.

Senator Mitchell was speaking in support of an amendment to the Bail Reform Act co-sponsored by Sen. Arlen Specter to add a sixty day time limit to the Act. *Id.* at S924. The amendment was defeated. *Id.* at S945.

[19] The original statute passed in 1970 required the United States Attorney to bring preventive detention cases to trial within sixty days. 23 D.C. Code § 1322(d)(2)(A). The Council of the District of Columbia amended the statute in 1982 to permit an extension of up to thirty days. 23 D.C. Code § 1322(d)(4) [Supp. 1986], D.C. Law 4-152.

Most of the states which permit preventive detention based upon future dangerousness place specific time limitations on detention. *See* Colo. Const. art. II, § 19(c)(2) (90 days); D.C. Code § 1322(d)(2)(A) (60 days); Fla. Stat. Ann. 907.041(4)(i) (90 days); Wisc.

Whether or not the length of detention authorized under the Speedy Trial Act alone is sufficient to violate the strictures of the Due Process Clause, *see United States v. Melendez-Carrion*, 790 F.2d 984, 1007 (2d Cir. 1986) (Feinberg, C.J., concurring), the length of detention authorized under Section 3142 heightens the need for procedural protections.

C. The Risk of Error and the Value of Additional Procedures

The second factor to be considered under *Mathews* is the risk of an erroneous deprivation of the private interest. There are two types of errors which must be minimized if Section 3142 is to survive scrutiny under the Due Process Clause. The first is the detention of a person who is innocent of the charges brought against him. Because Congress recognized that "regulatory" detention could not be justified on the basis of predicted dangerousness alone, a person who is acquitted of the charges against him must be released, regardless of his predicted future conduct. The "small but identifiable group" Congress sought to detain was composed of persons who were both guilty of past criminal conduct and believed to be likely to commit future offenses. A significant risk of error, therefore, is that an innocent person may be detained for an extended period before his innocence is established at trial. The second error which must be avoided is the detention of a person who, even if guilty as charged, is not likely to present a danger to the community. This individual too, falls outside the net which Congress intended to cast.

Stat. § 969.035(8) (60 days). Arizona, California and Virginia do not specifically incorporate time restrictions on pretrial detention, relying instead on their respective speedy trial provisions.

Of course, any time limits must be applied in such a way as to ensure adequate opportunity for defense preparation. *Cf.* 18 U.S.C. § 3161(c)(2).

Although the government baldly asserts, quoting *Schall*, "There are simply no 'additional procedures that would significantly improve the accuracy of the determination without unduly impinging on the achievement of legitimate state purposes.'" Pet. Br. at 39, a quick review of the procedures available under Section 3142 belies this claim.

1. *Procedures to Minimize the Risk of Erroneous Detentions of the Innocent.*

a. *Standard of Proof*

Despite the gravity of the interest at stake, Congress has provided nothing more than the requirement of a finding of probable cause to protect against the detention of innocent persons. Even the District of Columbia law requires a showing of a "substantial proability" that the defendant committed the offense. 23 D.C. Code § 1322(b)(2)(C), presumably more than the mere probable cause Section 3142 requires. *See United States v. Edwards*, 430 A.2d at 1339 (analogizing standard to "likelihood of success" standard to obtain civil injunction). Congress rejected this higher standard although it "might give some additional measure of protection against the possibility of allowing pretrial detention of defendants who are ultimately acquitted," Sen. Rep. 98-225 at 18, because it relied on the holding in *Edward* that probable cause was constitutionally sufficient. In the case of a defendant who is arrested following a grand jury indictment, which serves as a determination of probable cause, *United States v. Contreras*, 776 F.2d 51 (2d Cir. 1985); 8 *Moore's Fed. Practice* ¶ 5.102 [1] n.2 at 5.1-6-7 (2d ed. 1985), this means no hearing at all, on the issue of guilt or innocence.[20] At best, even after a preliminary hearing,

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[20] These, of course, are the very cases in which the government's interest in avoiding a hearing is weakest, since the government has had ample opportunity to gather its evidence. Moreover, in these cases, the government has little bona fide interest in objecting

Fed. R. Cr. P. 5.1(a), a "probable cause" determination means an intolerable risk of error when the stakes are as high as they are under Section 3142.[21] In several recent cases, this Court has stressed the importance of a high threshold of proof justifying deprivations of liberty like those at issue here. *Addington v. Texas* (clear and convincing evidence of mental illness and dangerousness required for involuntary civil commitment); *Allen v. Illinois*, —— U.S. ——, 106 S.Ct. 2990, 2993 (1986) (noting that dangerous sexual psychopath's commission of specific criminal acts must be proved beyond a reasonable doubt); *Jones v. United States*, 463 U.S. 354, 367 (1984) (person found not guilty by reason of insanity has had commission of criminal act proved beyond a reasonable doubt; risk of error in proof of mental illness by a preponderance of the evidence diminished by the defendant's concession that he is mentally ill).

In *Addington*, this Court rejected arguments that the standard of proving mental illness and dangerousness to justify involuntary hospitalization should be the same as the standard in a criminal trial. The Court noted that civil commitment is "not punitive" 441 U.S. at 428, and

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to providing "discovery" to the defense, since the government's disclosure obligations under Fed. R. Cr. P. 16 are already in effect.

[21] "[W]hen applied literally," as it has been in some districts, "subsection (f) automatically allows a prosecutor three extra days for investigation and preparation for the detention hearing. As a result, the statute provides for the possible detention without bail of every person charged with a federal crime." Note, "Problems with Granting Prosecutors' Requests for Continuances of Detention Hearings," 39 Stan. L. Rev. 701, (forthcoming 1987). This practice refutes the government's claim that Section 3142 provides more procedural safeguards than the statute in *Schall* because "the juvenile detention procedures did not require a preliminary finding of probable cause." Pet. Br. n.21 at 39. As this Court noted in *Schall*, "[i]f a juvenile is detained at his initial appearance and has denied the charges against him, he is entitled to a probable cause hearing to be held not more than three days after the conclusion of the initial appearance or four days after the filing of the petition, whichever is sooner."

that the nature of the inquiry is fundamentally different than the proof of facts in a criminal case. *Id.* at 429. The Court squarely rejected, however, the preponderance of the evidence standard:

> The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.

441 U.S. at 427. The same is true here. As in *Addington*, the government should be required to provide "clear and convincing" proof of guilt before the court may order preventive detention.[22] The existing procedure is little better than a coin toss.

b. *Opportunity for Confrontation*

A higher standard of proof would be virtually meaningless without a real opportunity to test the government's case and to offer exculpatory evidence. The interest of the accused in retaining his freedom is even greater than that of the parolee is retaining his conditional liberty on

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[22] History and current practice support this requirement. Early colonial laws allowed the denial of bail in capital cases "where the proof is evident, or the presumption great." Duker, "The Right to Bail: A Historical Inquiry," 42 Alb. L. Rev. 33, 80-81 (1977). See also *Hunt v. Roth*, 648 F.2d 1148, 1159 (8th Cir. 1981), *vacated as moot sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982). Although bail was denied in capital cases because of risk of flight rather than probable dangerousness, *United States v. Edwards*, 430 A.2d 1326 n.6, it was understood early that even in capital cases, a special showing was required to justify making an exception to a general rule favoring release on bail.

With one exception, *see* Code of Va. § 19.2-120(2), the states which permit pretrial detention for non-capital offenses on the basis of dangerousness require more than probable cause of guilt before a defendant may be detained. *See* Ariz. Const. art. II, § 22(3) (Cal. Const. art. I § 12(b) (fact evident presumption great); Colo. Const. art. II, § 19(b) (proof evident presumption great); D.C. Code § 23-1322(b)(2)(C) (substantial probability); Fla. Stat. § 907.041(4)(b) (substantial probability); Wisc. Stat. Ann. § 969.035(6)(a) (clear and convincing).

parole release. In *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), this Court held that although not entitled to "the full panoply of rights" due a criminal defendant, a parolee must receive before revocation:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Astonishingly, a presumptively innocent person accused of a crime receives less protection from an erroneous deprivation of liberty than a parolee, who has already been convicted and sentenced.

If he is lucky enough to have a preliminary hearing at all, the accused will have no opportunity to confront the witnesses against him, since the real witnesses will be insulated by one or more layers of hearsay. Fed. R. Cr. P. 5.1(a). *Cf. Schall v. Martin*, 467 U.S. at 275-76 (noting that under New York statute probable cause must be based on non-hearsay). Even though the risks arising from confrontation of witnesses cannot reasonably be said to be greater in a preventive detention hearing than they are in a parole revocation hearing, under Section 3142 the government bears no burden of justifying the denial of confrontation by "good cause." Questioning of witnesses in preliminary hearings is often restricted even if the question undermines the credibility of the government's evidence. *See, e.g., Coleman v. Burnett*, 477 F.2d 1187, 1200-1202 (D.C. Cir. 1973).[23] Nor does the defense have

[23] For example, it is not uncommon for counsel to be denied an opportunity to examine a witness on his opportunity to observe

a meaningful opportunity to counter the government's case,[24] least of all an innocent person accused of a crime he did not commit who has no opportunity to gather evidence and to establish his innocence. At a minimum, a pretrial detainee is entitled to a hearing as full and reliable as the one which a parolee must receive before revocation of parole.[25]

2. *Procedures to Minimize the Risk of Erroneous Detentions of the Nondangerous*

In *Williamson v. United States*, 184 F.2d 280, 282-3 (2d Cir. 1950), Justice Jackson, as Circuit Justice, denied the government's motion to revoke the bond of allegedly dangerous persons convicted of violating the Smith Act, pending consideration of their petition for a writ of certiorari. He wrote:

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the person committing the crime, even though the unreliability of the identification should be relevant to the existence of probable cause. *See e.g., United States v. King*, 482 F.2d 768, 775 (D.C. Cir. 1973).

[24] Congress rejected a proposal to confer immunity on the defendant's testimony at the preventive detention hearing. H.R. 5865, 98th Cong., 2d Sess. *See* H. Rep. 98-1121 at 58 (additional views of Reps. Frank and Glickman). *See United States v. Perry*, 788 F.2d at 115 (discussing dilemma and holding that judiciary may confer immunity); ABA Standards, Pretrial Release, 80-5.10(c) (1985); 23 D.C. Code § 1322(d)(6) (1981) (testimony of defendant inadmissible as evidence of guilt).

[25] It is clear that the final revocation hearing contemplated by *Morrissey* is more elaborate than the "preliminary hearing" conducted to detain a parolee—temporarily—pending a revocation hearing. *See* 408 U.S. at 487. But even at the initial hearing, "a person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence. However, if the hearing officer determines that an informant would be subjected to risk of harm of his identity were disclosed, he need not be subjected to confrontation and cross examination." *Id.*

> it is still difficult to reconcile with traditional American law the jailing of persons by the Court because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsumated offenses is so unprecedented in this country and so fraught with danger of excess and injustice, that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses on those of which the defendants stand convicted.[26]

This Court has said that, "from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct." *Schall v. Martin*, 467 U.S. at 278. But although it is possible to predict dangerousness, those predictions are notoriously and intolerably unreliable.[27] *See generally*, Ewing, "Schall v. Martin: Preventive Detention Through the Looking Glass," 54 Buff. L. Rev. 173 (1985). There may be legitimate reasons for relying on such predictions in other contexts—when we are dealing with persons who have

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[26] The convictions were ultimately affirmed. *Dennis v. United States*, 341 U.S. 494 (1951).

[27] Even the Justice Department had its doubts about the reliability of these predictions. In testimony before the House Committee on Civil Rights, Civil Liberties, and the Administration of Justice, Deputy Associate Attorney General Jeffrey Harris stated the government's case as follows:

> While surely predictions [of dangerousness] were not infallible, it is clear that the presence of certain combinations of offense and offender characteristics . . . have a strong positive relationship to the probability that the defendant will commit a new offense while on release.

Hearings at 164. *Accord* Sen. Rep. 98-225 at 9 ("strong positive relationship to predicting the probability"). U.S. Dept. of Justice, Bureau of Justice Statistics, "Pretrial Release and Misconduct" 4 (1985) (correlation between prior record and misconduct, but not predictive enough to be more likely than not); INSLAW Study at 58. "A strong positive relationship to the probability" is not the stuff of which clear and convincing evidence is made.

already been convicted of a crime for purposes of sentencing, *e.g.*, *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (opinion of Stewart, Powell and Stevens, JJ.), *Barefoot v. Estelle*, 463 U.S. 880, 890-902 (1983), or persons who have been convicted and sentenced for purposes of parole, *e.g.*, *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 6 (1979). Prediction is, by definition, the best we can do and predicted dangerousness, however unreliable, is only one of many factors which enter into these decisions. If the prediction of dangerousness is to be the basis for detaining a person pretrial, due process requires that the inherent unreliability of such predictions be minimized to the greatest extent practicable.

a. *Standard of Proof*

It is unclear what the government's ultimate burden of proof is under Section 3142. The statute requires clear and convincing proof of the facts the judicial officer relies on to find dangerousness. "The statute says nothing, however, regarding the degree of belief in dangerousness these facts, once proven, must produce in the mind of the judicial officer before the accused may be detained." Natalini, "Comment: Preventive Detention and Presuming Dangerousness Under the Bail Reform Act of 1984," 134 U. Pa. L. Rev. 225, 234 (1985).

Congress has cast additional doubt on the government's burden of establishing dangerousness by creating statutory presumptions of dangerousness when the accused has been charged with certain enumerated crimes. 18 U.S.C. § 3142(e)(1), (2). Strangely, this presumption of "clear and convincing" proof arises from a showing of probable cause [28] that the defendant committed one of the specified

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[28] A presumption which bootstraps probable cause into clear and convincing evidence is facially invalid. *See Ulster County Court v. Allen*, 442 U.S. 140 (1979). This case, of course, does not present an occasion specifically to consider the validity of the presumptions.

crimes. *See generally* Natalini, "Comment: Preventive Detention and Presuming Dangerousness under the Bail Reform Act of 1984," 134 U. Pa. L. Rev. 225 (1985); Fishbein, "Unconstitutionality of Rebuttable presumptions in the Bail Reform Act of 1984" (1986) (unpublished ms. on file at the Yale Law Journal).

Unless the government shows that the accused will prove a danger to the community by clear and convincing evidence, the risk of erroneous determinations is excessive. There is nothing unattainable about this standard. *See Addington v. Texas*, 441 U.S. 418 (1979). To the extent that Section 3142 accepts a lesser showing, it violates the Due Process Clause.

b. *Notice*

Section 3142 is also deficient because it does not provide a person accused of a crime with notice and a meaningful opportunity to rebut the claim that he is dangerous. *See* ABA Standards, *Pretrial Release*, 10.5.10(b) (right to pre-hearing discovery) 10-5.4(a)(ii) (prosecutor's motion to detention must specify grounds for believing defendant meets standard for detention.") "Safety of the community," is such an all-inclusive term, that a defendant notified that the government is moving for preventive detention will have no way to know what specific facts the government will try to establish at the hearing, and which he must then try to rebut. Yet, even in the dangerous and restrictive environment of a prison, an inmate faced with internal disciplinary proceedings is entitled, under the due process clause, to notice of the facts the prison intends to rely on at the disciplinary hearing. *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974). The risk of error when the defendant is caught by sur-

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The use of the presumptions does, however, cast some doubt on the enforceability of the "clear and convincing" burden of proof in a realm of inherently speculative and unreliable evidence.

prise and has no way to contradict the government's evidence is intolerable.[29] Yet, Section 3142 does not require the government to provide the defense with notice of what it intends to show at the hearing. This renders the defendant's right to seek a continuance of the hearing in order to prepare, 18 U.S.C. § 3142(f), an empty formality in most cases.

c. *Opportunity for Confrontation*

The "clear and convincing" standard is meaningless, if it is based entirely on hearsay evidence and proffer which the defendant has no opportuntiy to test through confrontation. Section 3142(f) suspends the normal rules of evidence, and opens the gates to hearsay. Our experience in the District shows witnesses with personal knowledge of the events to be proved may be removed from the courtroom by one or more layers of hearsay.

The liberty interest at stake in a preventive detention hearing is greater than that of a parolee in avoiding revocation.[30] The right to confront and cross-examine witnesses must be available here on the issue of future dangerousness. This right cannot be limited, as it is in Section 3142(f), to the cross-examination of "witnesses who appear at the hearing," when those witnesses are

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[29] *Edwards* held that notice of the prior acts relied on to establish a "pattern of behavior" manifesting dangerousness was constitutionally required; the court found the notice on Edwards satisfied constitutional standards, because Edwards' counsel had received a copy of his statement admitting several prior offenses before the hearing, and because counsel attended a lineup. 430 A.2d at 1340-41.

[30] The higher standard for proving the facts relied on to predict dangerousness requires a correspondingly greater opportunity to investigate bias than is required in a suppression hearing where the only issue is probable cause at the time of arrest. *See United States v. Raddatz*, 447 U.S. 667, 679 (1980); *United States v. Matlock*, 415 U.S. 164, 173-75 (1974); *McCray v. Illinois*, 386 U.S. 300 (1967).

mere conduits for unreliable and unsubstantiated charges. *See* ABA Standards, *Pretial Release* 10-5.10(c) (normal rules of evidence should apply at detention hearings).

Deprived of notice and the opportunity to gather evidence, and the opportunity to contradict evidence by cross-examination, an accused person faced with a preventive detention hearing is virtually powerless to overcome the government's allegations. The plight of the defendant who must overcome a presumption of dangerousness is even bleaker. Section 3142 omits safeguards which are essential to the discovery of the truth.

D. The Government's Interest in Unreliable Procedures.

The government asserts an interest in detaining a "small but identifiable" group of dangerous persons charged with federal crimes. But the government has no valid interest in detaining the innocent or the nondangerous under Section 3142.[31]

To the extent that the government's interest in avoiding the procedures we have discussed is to prevent dis-

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[31] A person wrongfully detained under the 1984 Bail Reform Act has no post-deprivation remedy for the loss of his employment, or the physical and emotional suffering he has endured. The judge who entered the detention order will be immune from liability, *Stump v. Sparkman*, 435 U.S. 349 (1978), as will the prosecutor, *Imbler v. Pachtman*, 424 U.S. 409 (1976), and the witnesses who testified against him, *Briscoe v. Lahue*, 460 U.S. 325 (1983). The government has not waived its sovereign immunity with respect to such claims. 28 U.S.C. § 2680. A detainee who is acquitted will not even have the consolation of jail credit for time served.

This Court has considered the availability of post-deprivation remedies in a number of contexts. *E.g., Bivens v. Six Unknown Agents*, 403 U.S. 388, 420-21 (1971) (Burger, C.J., dissenting) (effect of availability of civil remedy on 4th Amendment exclusionary rule); *Rose v. Mitchell*, 443 U.S. 545, 583 n.4 (1978) (Powell, J., concurring) (availability of civil injunctive relief, criminal prosecution); *Parratt v. Taylor*, 451 U.S. 527, 543 (1981) (post-deprivation remedy for loss of prisoner's property).

closure of potential witness and evidence to the defense, this interest is entitled to little weight. Increasingly, the federal and state courts have rejected the "ambush" model of trial, and have encouraged more complete discovery before trial in criminal as well as civil cases. *E.g.*, Fed. R. Cr. P. 26.2 (disclosure of witness statements); Fed. R. Cr. P. 12.1 (notice of alibi defense). As this Court said in *Dennis v. United States*, 384 U.S. 855, 871 (1966), "[There is a] growing realization that disclosure rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice."

The federal courts are well-equipped to limit examinations to prevent improper efforts at discovery,[32] while preserving the defendant's rights to test the evidence on which the government is relying to deprive him of his liberty before trial. In comparison to the individual liberty interest at stake, the government's interest in avoiding more reliable fact-finding procedures is insignificant.[33]

In fact, the government's interest should be compatible with the interest of the accused in reliable decision-making. The imprisonment of the innocent impairs the public interest in assuring all citizens the unfettered enjoyment to life, liberty, and property, so long as they do not

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[32] *See Coleman v. Burnett, supra.* Any interest in avoiding harm to a particular witness can be satisfied, on a showing of good cause, by appropriate protective orders. The presumption, however, should be in favor of full cross-examination, just as it is in parole revocation hearings. *Morrissey v. Brewer*, 408 U.S. at 489.

[33] The government certainly has no interest in a lower standard of proof simply because at an early stage in the case it has little evidence. Although no one argues that the applicable standard should be the same as that for conviction, the defendant's liberty interest requires that the evidence to detain for months or years be more substantial than what is required to justify an arrest. Moreover, as a practical matter, many federal detention hearings will follow an extensive grand jury investigation and an indictment.

violate the law. The more erroneous preventive detention decisions that are made, the greater the harm to the sense of security from wrongful imprisonment which every citizen should enjoy. The denial of procedural safeguards which would make preventive detention decisions more accurate cannot be justified solely on the ground that it will be easier for the government to win detention hearings without them.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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UNITED STATES OF AMERICA,

Petitioner,

—v.—

ANTHONY SALERNO AND VINCENT CAFARO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION AND ACLU FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether section 3142 of the Bail Reform Act of 1984, 18 U.S.C. § 3142 (Supp.II 1984), which authorizes the pretrial preventive detention of indicted individuals solely on the ground of dangerousness, violates the rights secured by the Fifth and Eighth Amendments of the United States Constitution.

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et seq., 98 Stat. 1976, codified
at 18 U.S.C.
§§ 3141 et seq (Supp. II 1984).....i

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INTEREST OF THE AMICI CURIAE[1/]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members. The ACLU is dedicated to preserving and protecting the rights secured by the Constitution. Since its inception, the ACLU has participated in litigation to safeguard and to implement the guarantees of the Bill of Rights. The ACLU Foundation of Southern California and the New York Civil Liberties Union are affiliates of the ACLU. The ACLU Foundation of Southern California participated as amicus curiae before the Ninth Circuit in United States v. Walker, No. 86-5274, which raised issues similar to those in the instant case.

1/ The letters of consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

This case presents this Court with two contrasting views of a criminal justice system. Only one, however, is consistent with our Constitution. The Constitution provides that individuals cannot be stripped of their liberties except in particular circumstances, and then, not without basic procedural protections. Section 3142 of the Bail Reform Act of 1984 undermines these fundamental guarantees.

The government contends that it may incarcerate indicted individuals whom it predicts will, in some unspecified way, endanger others and the community. Adoption of such broad governmental power would dispense with the historical and constitutional principle that the government may not incarcerate individuals for unspecified offenses, for offenses not committed or even attempted, or without proof

beyond a reasonable doubt.

The government argues that it is already vested with wide latitude as to how it treats individuals under indictment, and that the fact of indictment by itself gives the government the power to restrict an individual's liberty in ways otherwise limited to individuals convicted of offenses.

The period between indictment and conviction is indeed different in many significant respects from both the period before indictment and the period after completion of a criminal sentence. This does not mean, however, that pretrial detention may be used solely to accomplish what the processes of the criminal justice system are designed to do -- protect the public through the imposition of incarceration. Pretrial detention has its legitimate purposes, each of which directly serves the integrity of the judicial process. Preventive detention is

different -- it seeks to serve only the same public interest in safety served by the criminal justice system itself, but without the constitutional safeguards built into the criminal justice system. It is thus a constitutional subterfuge.

The preventive detention provisions of the Bail Reform Act of 1984 are unconstitutional in several respects. First, preventive detention violates the due process guarantee of the Fifth Amendment by imposing punishment without trial. Incarceration represents the most severe affirmative disability and restraint society may impose upon one of its members, short of death. Even if preventive detention were to be viewed as merely "regulatory" and not punitive, it would unconstitutionally impinge upon a vital liberty interest to a substantial degree without compelling justification.

Second, even were it held that

preventive detention does not constitute unconstitutional punishment and that the liberty interest at stake is outweighed by the government's goals, the statutorily established procedures are insufficient to ensure accurate and fair decisionmaking. Given the enormity of the personal interest at stake -- liberty in its most basic sense -- and the unusually high risk of error, the Act's minimal procedural requirements and its acceptance of reliance upon government proffers and hearsay are wholly inadequate.

Third, the Act unconstitutionally relies on a mandatory impermissible presumption. There is no logical connection between the factors that the Act specifies and the presumption it establishes that the individual poses an irremediable risk to the community. This invalid presumption operates to shift to an accused individual the burden of proving the unproveable fact that he or

she will not do anything "dangerous" in the future.

Fourth, the Act is unconstitutionally vague. Nowhere does it indicate what constitutes "dangerousness." It therefore represents a hunting license for the government to incarcerate those who are undefinably "bad," providing no advance warning of what sort of future "badness" a person should avoid and little basis on which any individual might defend himself against the amorphous accusation.

Finally, the Act vitiates the bail provision of the Eighth Amendment. If a person accused of a crime can be held without bail because the government lodges against him or her a further accusation of an offense that has not yet been committed, then that renders meaningless the guarantee of reasonable bail when accused of an offense that <u>has</u> been committed.

It is fundamental to our system that the

government cannot incarcerate people for criminal behavior without proof of guilt beyond a reasonable doubt. If this statute is upheld, the distinction between being accused of a crime and being convicted of a crime will be denigrated, as will the rights of a trial by jury and the presumption of innocence.

ARGUMENT

I. DETENTION OF AN INDIVIDUAL BASED ON THE POSSIBILITY THAT HE OR SHE MAY COMMIT SOME UNKNOWN AND UNSPECIFIED OFFENSE IN THE FUTURE VIOLATES DUE PROCESS.

A. Because The Purpose And Effect of Preventive Detention Is Punishment, Preventive Detention Violates Due Process By Inflicting Punishment Without An Adjudication Of Guilt.

Infliction of punishment without an adjudication of guilt violates due process. Bell v. Wolfish, 441 U.S. 520, 535-36 (1979); Ingraham v. Wright, 430 U.S. 651, 672 n.40, 674 (1977); cf. United States v. Lovett, 328 U.S. 303, 306, 316 (1946). The government therefore argues that incarcerating an individual because the State believes him or her to be nefarious is not punishment, but, rather, constitutes a mere "regulatory" measure. This characterization of preventive detention is not tenable under this Court's prior rulings.

This Court has used a variety of approaches to determine whether a particular government action is regulatory or punitive. Compare, e.g., Lovett, 328 U.S. at 315-16 (statute that results in certain individuals being permanently prohibited from government service inflicts punishment because of its effect and its similarity to traditional punishment, notwithstanding description of act as compensatory and fiscal in nature), with Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (statute in question was punitive because of "the objective manifestations of congressional purpose").

These tests require consideration of both the purpose and effect of a measure, and the purpose that Congress itself assigns to a statutory provision is not controlling. See id. at 169-84; Regan v. Wald, 468 U.S. 222, 237 (1984). "[E]ven a clear legislative

classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute." Trop v. Dulles, 356 U.S. 86, 95 (1958); see also Lovett, 328 U.S. at 315-16. Thus, although Congress stated that preventive detention under section 3142 was not intended to promote the traditional aims of punishment such as retribution or deterrence, it was well aware that the constitutionality of preventive detention would surely be challenged; its statement of "intent" cannot by itself serve as a shield against those challenges.

The determination of whether section 3142 is punitive or regulatory must look beyond congressional statements to objective factors. The relevant factors include:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter,

> whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears to be excessive in relation to the alternative purpose assigned."

Mendoza-Martinez, 372 U.S. at 168-69. An examination under these criteria of the preventive detention provisions of the Bail Reform Act demonstrates that the Act is punitive in both purpose and effect:

1. The statute authorizes the most severe "affirmative disability" and "restraint" short of execution -- the total deprivation of freedom. Numerous additional affirmative disabilities and restraints also flow from pretrial detention. For example, association with others is totally controlled, access to reading materials and public information is severely circumscribed, gainful economic activity is prevented, and

consultation with counsel in preparation for trial is restricted. These disablities may continue for months while the defendant awaits a trial.

2. The sanction only "comes into play" upon a finding of scienter. First, detention under section 3142 necessarily imputes to the detained defendant intent to harm the community in the future. Second, to the extent that both the present cause for arrest and prior criminal acts are predicates for detention under the Act, 18 U.S.C. § 3142(e), scienter is an implicit trigger of the sanction.

3. The primary purpose of pretrial detention is to promote objectives traditionally associated with punishment in the criminal justice system. The purpose of preventive detention is incapacitation -- preventing an individual from committing a crime in the future by depriving that

individual of liberty. See United States v. Brown, 381 U.S. 437, 458 (1965). Incapacitation is recognized as a key element of punishment and sentencing in current federal sentencing legislation. See 18 U.S.C. § 3553(a)(2)(C) (Supp. II 1984). Detention under section 3142 also serves the goal of deterrence, a traditional purpose of punishment, by warning potential offenders that they can be imprisoned even before they have been given a trial. The statute also furthers the most punitive of sentencing goals -- retribution -- by employing a presumption in favor of the sanction when there is probable cause that the person has committed a specified offense. 18 U.S.C. § 3142(e).

Although preventive detention contains elements of a "regulatory" measure since it is forward looking and is intended to protect the community from future harm, cf. Schall v.

Martin, 467 U.S. 253, 269 (1984), this does not render it non-punitive. Measures can be both regulatory and punitive; in fact, all punishment based on an incapacitative rationale is also forward looking and intended to protect the community from future harm. It is in that sense "regulatory" -- but that does not make it any less punitive.

The regulatory elements of preventive detention do not and cannot disguise its punitive effect and purpose. Nor does the mere fact that Congress calls a punitive measure regulatory make it so. Jailing a person because the state thinks him or her dangerous constitutes punishment, pure and simple. Because preventive detention is imposed without a formal adjudication of guilt, it deprives the accused of his or her liberty and violates the due process clause of the Fifth Amendment.

B. Preventive Detention On Grounds Of General Dangerousness Is Inconsistent With The Traditional Rationale For Pretrail Detention: Protection Of The Integrity Of The Judicial Process.

In order to justify preventive detention under section 3142, the government incorrectly asserts that the traditional circumstances for legitimate pretrial detention of a competent adult defendant -- likelihood of flight, including the inability to make bail, and demonstrated threat to a participant in the judicial process -- are not qualitatively different from preventive detention based upon dangerousness.

The traditional examples of pretrial detention, however, each have as their unifying purpose and principle the protection and preservation of the integrity of the judicial process. Thus, if the likelihood of flight of a defendant is demonstrated, detention may be warranted; similarly, if

bail is set to deter flight, then detention for failure to post bail may also be justified; if witnesses, jurors, or other trial participants are actually threatened by a defendant, detention, again, may be necessary. Society's right to determine the guilt or innocence of the accused, and the interest of both society and defendants in the integrity and fairness of the criminal justice system, therefore, sometimes justify extraordinary measures, including a deprivation of liberty.[2/]

But this principle does not apply to preventive detention on the basis of a generalized allegation of dangerousness. The

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[2/] Analogously, this Court's cases granting absolute immunity from damage liability to the participants in this process demonstrate the recognized paramount interest in preserving the integrity of our justice system. See, e.g., Briscoe v. Lahue, 460 U.S. 325 (1983) (witness immunity); Stump v. Sparkman, 435 U.S.349 (1978); (judicial immunity); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutorial immunity).

necessity of preserving the adjudicative process, which is triggered by an indictment, is irrelevant to the government's assertion that it may protect the general public from individuals who have been merely indicted and not adjudged guilty. In attempting to protect the public under section 3142, Congress short-circuited the very purpose of the criminal justice system: protection of the public from those who may cause it harm. By substituting preventive detention for criminal adjudication, section 3142 denies due process.

C. Even If Preventive Detention Is Regulatory And Non-Punitive, Section 3142 Violates Due Process Because Individual Liberty Interests Outweigh The Government Interests.

Even if one assumes, arguendo, that preventive detention authorized by section 3142 is a regulatory measure, it is still subject to scrutiny under the due process

clause of the Fifth Amendment. See Schall v. Martin, 467 U.S. at 264-66. In Schall, this Court determined that a legislative provision permitting the detention of juveniles for up to 17 days without a formal adjudication of guilt was a regulatory provision. But as Schall illustrates, due process, even for "regulatory" provisions, requires a determination of the substantiality of the government's interest in relation to the interests of the individual. Id. at 265.

This Court in Schall expressly found that New York's legitimate limited purpose was to provide the child with a controlled environment and to separate him or her from improper influences pending the speedy disposition of the case. Id. at 264, 270. The Court adopted the New York Court of Appeals' justification for detaining juveniles before trial as "protecting the juvenile from his or her own folly." Id. at

265 (citing People ex rel. Wayburn v. Schupf, 385 N.Y.S.2d 518, 520-21 (1976)).[3] This Court also observed that juveniles in New York are not considered criminally responsible for their conduct and that the juvenile court is charged not with finding guilt or innocence, but rather with determining and pursuing the needs and best interests of the child. 467 U.S. at 257 n.4.

Not only did the Schall Court emphasize the state's interest in protecting children, it recognized that a juvenile's liberty interest is substantially weaker than an adult's, since "juveniles, unlike adults, are

[3] The Court quoted at length from the New York Court of Appeals' decision in Wayburn: "For the same reasons that our society does not hold juveniles to an adult standard of responsibility for their conduct, our society may also conclude that there is a greater likelihood that a juvenile charged with delinquency, if released, will commit another criminal act than that an adult charged with crime will do so. To the extent that self-restraint may be expected to constrain adults, it may not be expected to operate with equal force as to juveniles." 465 U.S. at 265-66 n.15 (quoting 385 N.Y.S.2d at 520-21).

always in some kind of custody." Id. at 265 (citing Lehman v. Lycoming County Children's Services Agency, 458 U.S. 502 (1982)).

Finally, in Schall, the conditions of confinement were significantly different than they are here. All juveniles detained in New York are entitled to trial within, at most, seventeen days or, in many cases, six days. 467 U.S. at 270. Individuals detained under the Bail Reform Act however, may be incarcerated not only for weeks, but for

months.[4] In addition, confinement under the New York provision in Schall is significantly less restrictive than pretrial incarceration of an adult. Id. at 271.

Detention of those who lack the capacity to be fully accountable and responsible for their actions, such as children or mental incompetents, is a traditionally valid exercise of state power. See, e.g., id. at 265; Minnesota ex rel. Pearson v. Probate

[4] For example, in United States v. Accetturo, 623 F. Supp. 746 (D.N.J. 1985), remanded for further proceedings, 783 F.2d 382 (3d Cir. 1986), the district court noted that "the reality of detention here will mean incarceration of presumptively innocent individuals for approximately ten months." 623 F. Supp. at 762. See also United States v. Melendez-Carrion, 790 F.2d 984, at 1005 (Feinberg, C.J., concurring) (at time of opinion, defendants had been preventively detained more than seven months); United States v. Walker, supra (bi-weekly custody reports of Central District of California, made pursuant to Fed. R. Crim. P. 46(g), indicated that 41 pretrial detainees had been in custody for more than four months, eight individuals for more than six months, and two individuals had been in pretrial detention for more than one year) (District Court Supplemental Memorandum Opinion, Appendix of Amicus Curiae, Exhibit B). In operation, the Speedy Trial Act, 18 U.S.C. § 3161, has not worked to preclude prolonged detention.

Court, 309 U.S. 270 (1940); Jacobson v. Massachusetts, 197 U.S. 11 (1905). It does not embrace the much broader use of power over competent adults asserted by the government in this case.

Preventive detention of adults under the Court's reasoning in Schall can be upheld only upon a conclusion that the government's interest in preventing future crimes outweighs the interest of competent adults in freedom from prolonged detention. But, if the government's interests were understood to outweigh an adult's liberty interests, the government could incarcerate any person -- indicted or not -- based on the possibility that he or she might commit some unspecified dangerous act in the future. As Judge Newman wrote in Melendez-Carrion:

> It cannot seriously be maintained that under our Constitution the Government could jail people not accused of any crime simply because

> they were thought likely to commit crimes in the future. Yet such a police state approach would undoubtedly be a rational means of advancing the compelling state interest in public safety. In a constitutional system where liberty is protected both substantively and procedurally by the limitations of the Due Process Clause, a total deprivation of liberty cannot validly be accomplished whenever doing so is a rational means of regulating to promote even a substantial government interest.

790 F.2d at 1000-01.

That preventive detention under section 3142 comes into operation only after an individual has been arrested and charged with the commission of a crime does not save the statute. For even convicted defendants who have completed service of their sentences may not, consistent with due process, continue to be confined beyond the term of their sentences.

The government argues that regulatory detention is the norm, rather than the exception. The government claims that, in

its wisdom, it has the power to detain individuals identified as "dangerous" and that, as a consequence, it need not and should not have the burdens of establishing guilt beyond a reasonable doubt before doing so. The government's casual citation to Korematsu v. United States, 323 U.S. 214 (1944), as suitable precedent for preventive detention exposes the bankruptcy of the claim.[5/]

II. PRETRIAL DETENTION VIOLATES PROCEDURAL DUE PROCESS UNDER THE FIFTH AMENDMENT

Assuming, arguendo, that the government's interest in preventive detention outweighs an individual's interest in

5/ In 1984, a writ of coram nobis was granted to vacate the conviction of Fred Korematsu. See Korematsu v. United States, 584 F.Supp. 1406 (N.D. Cal. 1984). The government agreed that the conviction should be vacated. 584 F.Supp. at 1410. The Korematsu decision relied on here by the government has been officially proclaimed to be a "setback to fundamental American principles." Presidential Proclamation 4417, Feb 25, 1976.

freedom, because preventive detention deprives one of liberty the statute is necessarily subject to scrutiny under the procedural due process guarantees of the Fifth Amendment. See Mathews v. Eldridge, 424 U.S. 319 (1975). As this Court has explained, procedural due process is a flexible concept that "calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). The determination of what process is due in any given situation depends upon an analysis of the three factors identified by the Court in Mathews: (1) the private interest at stake; (2) the risk of an erroneous decision and the probable value of additional procedures; and (3) the governmental interest at stake and the administrative burden, including the financial cost, that additional procedures would entail. Mathews, 424 U.S. at 335.

This Court, and not Congress, decides the adequacy of the process provided. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985).

A. This Case Implicates The Most Important Individual Interests, Presents An Unusually High Risk Of Error, And Involves A Relatively Light Burden On Government.

1. The liberty interest of the individual

The first Mathews factor is the private interest involved. The private interest at stake here is enormous: The interest in being free of the complete deprivation of liberty through imprisonment. "The value of protecting our liberty from deprivation by the State without due process of law is priceless." Lassiter v. Dep't of Social Services, 452 U.S. 18, 60 (1981) (Stevens, J., dissenting). This deprivation of liberty includes the total restriction not only of physical freedom, but also of freedoms

attendant thereto -- including the freedom to associate with others, the ability to pursue gainful economic activity, sufficient access to counsel, and to prepare one's defense.6/

2. The exceptionally high risk of error

The second factor to be considered is the risk of error. An erroneous deprivation

6/ Preventive detention thereby also implicates the Sixth Amendment right to counsel. While the statute provides that a person preventively detained is to have access to counsel and may apply for release in the custody of the United States Marshall to assist in his or her defense, 18 U.S.C. § 3142(i), a defendant who is detained is less able to assist in the preparation of his or her defense than is a person free on bail. Studies have established that defendants who are incarcerated pending trial are more likely to be convicted than those at liberty to prepare for trial. Ares, Rankin and Sturz, The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole, 37 N.Y.U. L. Rev. 67, 84-86 (1963). For example, the pretrial detention facilities for the Central District of California are located at the Federal Correctional Institution at Terminal Island in San Pedro, California, approximately 30 miles from the federal courthouse. As a result, whenever one of the Walker defendants sought to consult with his attorney, the attorney had to travel a significant distance, severely constraining contact and coordination between the accused and counsel.

of liberty occurs whenever bail is denied a defendant who would not have committed a crime had he or she been released on appropriate conditions of bail. The frequency with which errors occur cannot be known precisely, but we do know that, under the statute, error rates will be high. Notwithstanding extensive reseach efforts, it is generally agreed that our ability to identify who, in the future, will commit a crime is very limited. The procedures in section 3142 for making this determination are not rationally related to the type of prediction to be made.

As a task force of the American Psychological Association concluded in 1978:

> the validity of psychological predictions of dangerous behavior, at least in the sentencing and release situations we are considering, is extremely poor, so poor that one could oppose their use on the strictly empirical grounds that psychologists are not professionally competent to make such judgments.

American Psychological Association, Report of the Task Force on the Role of Psychology in the Criminal Justice System, 1978 Am. Psychologist 1110. A Harvard study conducted in 1971 found that no accurate method could be devised to determine which defendants would commit crimes while on bail. Preventive Detention: An Empirical Analysis, 6 Harv. C.R.-C.L. L. Rev. 300, 342-47, 369 (1971) (hereinafter "Preventive Detention"). A National Bureau of Standards study completed in 1970 also could find no reliable predictors of future dangerousness. See Compilation and Use of Criminal Court Data in Relation to Pre-trial Release of Defendants: Pilot Study, National Bureau of Standards Technical Note 535 (1970), discussed in Ervin, Foreword: Preventive Detention -- A Step Backward for Criminal Justice, 6 Harv. C.R.-C.L. L. Rev. 291, 293-95 (1971) (hereinafter "Ervin"); see

also Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 144 (1970) (Statement of Professor Hans Zeisel) (hereinafter "Zeisel Statement").

Over the past twenty years, sentencing and parole systems based upon the use of predictive measures have come into use. See, e.g., 28 C.F.R § 2.20 (1986) (U.S. Parole Commission "Salient Factor Score"). These predictive systems depend upon the use of available data to identify groups of convicted individuals that are more likely than others to commit crimes in the future.

For example, the United States Parole Commission uses a series of factors, such as the prior record of convictions and of incarcerations, heroin or other addiction, age, and the commission of crimes while on parole or probation. Id. Despite employment of the expertise currently available, the

predictive power of these systems is such that the Parole Commission's guidelines are accurate in predicting recidivism in less than 50% of the cases. See Hoffman, Screening for Risk: A Revised Salient Factor Score (SFS 81), 11 J. Crim. Just. 539 (1983).

The criteria employed in the Bail Reform Act to invoke preventive detention do not respond to these problems of inaccurate decisionmaking. It may be that as a statistical proposition the greater the number of criminal offenses a person has actually committed in the past, the greater the likelihood that he or she will commit another crime in the future. See Monahan, Predicting Violent Behavior 104-05 (1981). However, the criteria used by section 3142 to permit preventive detention -- that a person has been charged with committing a certain type of crime -- provides no basis for concluding that this defendant, rather than

any other, is more likely to commit a new crime if released. Nor does the fact that a defendant has been charged with a particular type of crime bear any verifiable relation to the conclusion that the defendant will commit some unspecified crime while awaiting trial on that charge.

This conclusion is supported by the National Bureau of Standards study. The researchers found that the rate at which criminal defendants committed new offenses upon release was virtually unaffected by the type of crime with which they had been charged. See Zeisel Statement, supra. Indeed, the rate of commission of new offenses while on release was greater for those who had been charged with misdemeanor offenses than for those who had been charged with felony offenses. Id. at 146.

Any group of pretrial detainees incarcerated on grounds of "dangerousness"

will inevitably, even if the best predictive tools are used, contain a large proportion of "false positives" -- persons incarcerated who would not have committed crimes while on pretrial release. The consequences of these errors are grave, and more troubling than similar errors in using such predictions to lengthen the incarceration of persons already convicted.

First, a pretrial finding of "dangerousness" imports a stigma of guilt, a stigma that remains even if the defendant is acquitted. Second, once an individual is convicted of criminal behavior, there are multiple, overlapping rationales for incarceration: Even if we are wrong about the need to incapacitate, imprisonment may be justified on other bases such as deterrence and punishment. In contrast, pretrial detention under the statute rests solely on the assessment of dangerousness; if that

decision is in error, no other reason justifies detention. Thus erroneous findings of dangerousness are particularly harmful, and they will occur frequently.

3. The government interests and burdens

The third Mathews factor is the government interest at stake. First, the government has an interest in the prevention of future crime and the consequent protection of the community. The relative importance of this interest varies with the type of harm to the safety of the community that is at issue. The interest in preventing illegal discharge of toxic waste, for example, is different from the interest in preventing the shoplifting of a pack of cigarettes.

But the statute abandons traditional mechanisms of deterrence and in so doing makes no distinction between the types of crime that a person might commit upon release

pending trial. It fails even to specify what dangers are a prerequisite to incarceration. Thus, the weighing of the government's interest must reflect the fact that its interest will vary widely depending upon the type of conduct or crime that might be committed.

Congress specifically intended that preventive detention apply only to a small group of defendants who pose a substantial risk to the community. S. Rep. No. 225, 98th Cong., 1st Sess. 6-7 (1983), reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3189. As written, however, section 3142 is not so narrowly focused. Indeed, as the facts of some of the cases brought under that section make plain, the range of offenders and offenses that fall within its scope is exceedingly broad.

Pretrial detention is sought in a range of cases, most of which do not involve well-

known defendants or allegations of organized crime. Under section 3142, the government has requested preventive detention in more than 1000 cases. See Showdown Is Likely on New Bail Law, Nat'l L. J., July 28, 1986, at 3. The three cases that the Ninth Circuit considered in United States v. Walker, Nos. 86-5262, 86-5274, 86-5772 (9th Cir. Oct. 27, 1986) (issuing order, opinion to follow),[7] its most recent review of the Bail Reform Act, are illustrative of the run-of-the-mill cases in which preventive detention is requested.

As in Salerno, all three of the Walker

[7] In Walker, the Ninth Circuit reversed the decision of the district court that agreed with the Second Circuit opinions in Salerno and in United States v. Melendez-Carrion, 790 F.2d 984 (2d Cir. 1986), that § 3142(e) is unconstitutional. The Ninth Circuit opinion has not yet been published; the order is at Appendix, Exhibit A. The district court's original and supplementary memorandum in Walker is at Appendix, Exhibit B. The Magistrate's Orders of Detention for the defendants in Walker are among the examples of detention orders provided in Appendix, Exhibit C.

defendants were incarcerated solely on the grounds of future dangerousness; none was found to pose a risk of flight. In all three of these cases, the Act permitted detention of ordinary criminal defendants. Further, in these cases, the decision to detain was made by a magistrate who simply checked boxes on a form. See Appendix, Exhibit C.

Second, the government shares the interest of defendants in ensuring the most reliable results possible. The government has an interest only in detaining those persons who would in fact commit a new crime if released on bail. Indeed, the government has an interest in preventing unnecessary, expensive incarceration of nondangerous defendants. The 1971 Harvard study analyzed crimes committed while on bail, and found the incidence of pretrial crime to be low (9.6%) and lower still for serious offenses (5.2%), Preventive Detention, supra, at 342-47, while

the National Bureau of Standards found the incidence of pretrial crime to be low -- 17% when felony and misdemeanor arrests were counted, only 5% when arrests for serious felonies were included. Ervin, supra, at 293-95.

Third, the government is concerned with the administrative burden and the cost of the decisionmaking procedures. However, because preventive detention should be utilized in a relatively small number of cases, the administrative burden and cost of additional procedural safeguards would likely be small. See 1984 U.S. Code Cong. & Ad. News 3182, 3189.

B. Given the Competing Interests, Section 3142 Provides Inadequate Process.

The government is wrong in asserting that, given the interests at stake, the

procedures are adequate.[8] A defendant is foreclosed from challenging in any way the reliability of the finding by the grand jury of past criminal conduct;[9] a defendant must defend against the vague allegation that he poses a risk to the "safety of the community"; and the government may (and usually does) present its evidence not only through hearsay, but through a proffer from the government's attorney without any live

[8] The government's position exemplifies the current trend to dismiss trials and full adjudications as unnecessary luxuries. See Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494 (1985). Whatever the merits of alternative dispute procedures, the trend toward truncated process has no place in criminal justice, where the most significant decisions — from the perspective of both the state and the individual — are made.

[9] This is true even though a grand jury indictment may be based on evidence that would be constitutionally inadmissible at trial and may also be based on hearsay allegations, presented by the government attorney seeking an indictment. See United States v. Calandra, 414 U.S. 338 (1974).

testimony at all.[10]

In addition, while procedures and analyses used in the parole setting yield predictions of future dangerousness that, at least, approach the rather unsatisfactory level of 50% accuracy, not even these methods are used to improve decisionmaking under section 3142.

Finally, although the statute provides for the taking of testimony and cross-examination of "witnesses who appear at the hearing," 18 U.S.C. § 3142(f), the government may proceed by proffer. Thus, the cross-examination right is illusory. Again, the case law reflects that such proffers are

[10] Indeed, in the Walker case, the government asserted that pretrial detention of defendant Rivas was warranted because he had committed other bank robberies. The government did not present this allegation through testimony but instead did so through a proffer by its attorney. As a result, defendant Rivas was completely deprived of any ability to test the reliability of the allegation that he had committed such acts.

commonplace and that the use of proffers and of hearsay evidence precludes the application of some of the procedural safeguards written into the Act. See, e.g., United States v. Delker, 757 F.2d 1390, 1396 (3rd Cir. 1985) ("discretion lies with the district court to accept evidence by live testimony or proffer"); see also United States v. Acevido-Ramos, 755 F.2d 203, 206 (1st Cir. 1985) (hearsay evidence may be used to sustain a decision of preventive detention). Far from becoming "mini trials," as the court in Delker feared, 757 F.2d at 1396, decisions to incarcerate for "dangerousness" are made quickly, in a pro forma manner, and often on the basis of a proffer of very limited

facts.[11] See Appendix, Exhibits B and C.

The paramount significance of the private interests at stake, together with the high potential for erroneous deprivations and the nature of the government's interests, require that procedural protections in addition to those set forth in the statute be provided before individuals can be detained on the grounds of dangerousness. Adequate protection would require, at a minimum, that defendants be able to contest the validity of the allegations of past criminal conduct that gave rise to the invocation of section 3142; that defendants be given notice of the conduct, crime, or type of crime that it is suspected they will commit if released, so that they might have a meaningful opportunity

[11] The Justice Department's instructions to its attorneys state that the government should attempt to use only hearsay or a proffer in all cases. See U.S. Dept. of Justice, Executive Office for United States Attorneys, Analysis of the Constitutionality of Pretrial Detention, 11.

to rebut such a claim; that any information relied upon by the government to seek pretrial detention, such as allegations of additional criminal conduct, be presented through witnesses with first-hand knowledge of such information; and that such witnesses and information be subject to full cross-examination.

The lack of specific criteria is exacerbated by the perfunctory hearing procedures commonly utilized in applying the vague standards of the statute. For example, in United States v. Walker, supra, the Magistrate's order of detention for each of the three defendants consisted only of a completed form, denominated "CR 94, 5/86." See Appendix, Exhibit C. The form tracks the language of the Bail Reform Act and provides spaces for checkmarks to indicate that the court has fulfilled its responsibilities under the Act. The form provides only four

and one-half lines for a statement of the reasons why the "defendant poses a risk to the safety of other persons or the community."

In these cases the Magistrate's "written findings of fact" -- required by section 3142(i) -- amounted to six words for Robert Walker, six words for Duon Walker, and thirteen words for Santiago Cortes Rivas. In United States v. Hoyos, No. 86-1269-H-B (C.D. Cal. Sept. 30, 1986), the magistrate used the same form to order the defendant detained on grounds of dangerousness simply by writing the words "the presumption" in the blank space on the form. See Appendix, Exhibit C. The use of such forms is commonplace. See United States v. Kouyoumdjian, 601 F. Supp. 1506, 1507 (C.D. Cal. 1985).

The paucity of meaningful procedural protections compels the conclusion that

section 3142 violates procedural due process. This Court should either strike down section 3142 or order that substantial additional procedural protections, as outlined above, accompany the detention determination.

III. PREVENTIVE DETENTION UNDER SECTION 3142 VIOLATES THE DUE PROCESS CLAUSE BECAUSE THE STATUTE CONTAINS AN IMPERMISSIBLE PRESUMPTION.

Under the Act, whenever a person is charged with an offense punishable by ten or more years of imprisonment under the Controlled Substances Act, 21 U.S.C. §§ 801 et seq. (1982), or the Controlled Substances Import and Export Act, 21 U.S.C. §§ 951 et seq. (1982), or is charged with committing an offense while armed, 18 U.S.C. § 924(c) (1982), and if the judge or magistrate finds probable cause to believe that the person

committed such an offense,[12] "it shall be presumed that no condition or combination of conditions will reasonably assure . . . the safety of the community." 18 U.S.C. § 3142(e)(3).

Although the presumption is rebuttable, if a defendant charged with one of the enumerated offenses fails to overcome it, the presumption itself is grounds for detention. In fact, magistrates have found dangerousness solely on the basis of "the presumption." See, e.g., Appendix, Exhibit C, United States v. Hoyos, No. 86-1269-M-B (C.D. Cal. Sept. 30, 1986).

Presumptions are governed by the due process clause and are valid only if "it can be said with substantial assurance that the presumed fact is more likely than not to flow

[12] The judicial officer need not make a finding of probable cause if an indictment has been returned. See United States v. Dominguez, 783 F.2d 702, 706 n.7 (7th Cir. 1986).

from the proved fact on which it is made to depend". Leary v. United States, 395 U.S. 6, 36 (1969); see Turner v. United States, 396 U.S. 398 (1970); United States v. Romano, 382 U.S. 136 (1965); Tot v. United States, 319 U.S. 463, 467 (1943).

There is no rational connection here between the established fact (probable cause to believe a defendant committed a drug offense punishable by more than ten years, or an offense while armed) and the presumed fact (that the defendant poses a future danger to the safety of the community that no condition or combination of conditions can prevent). As discussed in Part II, supra, current knowledge does not enable us to determine, with any significant degree of certainty, who will commit a crime in the future. See, e.g., Monahan, supra, at 27-28; Hoffman, supra, passim.

It is irrational to presume that someone

charged with committing one of the offenses enumerated in section 3142(e) is more likely to pose a danger to the safety of the community than someone charged with a different offense. This is particularly true given the extraordinarily broad group of offenders and conduct encompassed by the offenses enumerated in section 3142(e). For example, a person with no prior criminal record who is alleged to have participated, however incidentally, in a marijuana conspiracy is presumed dangerous under the statute. 21 U.S.C. §§ 841, 846 (1982); see, e.g., United States v. Walker, supra.

This Court has stated that the law may use predictions. See Schall, 467 U.S. at 278 ("from a legal point of view, there is nothing inherently unattainable about a prediction of future criminal conduct"). However, to say that the use of predictions is, in theory, legally permissible is not to

say that section 3142 of the Bail Reform Act is in fact based upon supportable predictions. The Bail Reform Act does not require the use, even marginally, of the predictive tools employed by sentencing and parole guidelines -- or any other recognized, if only minimally successful, method for predicting dangerousness. Rather, the Act permits the indiscriminate labeling of individuals as dangerous and authorizes their detention before trial.

The statutory presumption is also invalid because its effect is to switch the burden of production and persuasion from the prosecution to the defendant, thereby obviating the "clear and convincing" standard of section 3142(f). The presumption is mandatory: "[I]t shall be presumed that no condition. . . ." 18 U.S.C. § 3142(e) (emphasis added). Such mandatory presumptions are unconstitutional under

Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, 471 U.S. 307, 308-313 (1985) (presumption unconstitutional although accompanied by explicit reminder that it was rebuttable).[13/] While these cases address the issue of presumptions in the context of criminal cases under a "beyond a reasonable doubt" evidentiary standard, the due process analysis of these opinions is appropriately applied where, as here, the issue to be determined results in deprivation of the cherished interest in liberty.

But perhaps the most damaging -- and damning -- aspect of the application of the presumption under this statute is that it places on the defendant the onus of proving what is impossible to prove: that he or she will do nothing objectionable in the

13/ Compare County Court of Ulster County v. Allen, 422 U.S. 140 (1979) (lower standard of review when a presumption is permissive rather than mandatory).

future. Under our system of law, an individual cannot be convicted either on the basis of thoughts or intentions without any actus reus, or on the basis of status, Robinson v. California, 370 U.S. 660 (1962). Thus, it would be a startlingly novel doctrine to hold that because an individual is among a certain group of people who might engage in harmful conduct in the future, he or she too is dangerous and therefore may be incarcerated. This not only works a dramatic reversal in our constitutional presumption that an individual stands innocent until proven guilty -- it works an awe-inspiring metaphysical transmogrification so that now an individual can stand punishable for an offense before it has even been contemplated.

IV. THE STATUTE IS UNCONSTITUTIONALLY VAGUE.

Statutes that work a deprivation of liberty must provide fair notice of what conduct is proscribed and must provide clear

criteria so that the enforcement of the statute will not be arbitrary or discriminatory. See, e.g., United States v. Reese, 92 U.S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."). Accordingly, this Court has not hesitated to strike down laws that fail to meet this fundamental guarantee of fairness. See, e.g., Kolender v. Lawson, 461 U.S. 352 (1983); Colautti v. Franklin, 439 U.S. 379 (1979); Smith v. Goguen, 415 U.S. 566 (1974); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); see generally Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960). As this Court has stated, "A criminal statute must be sufficiently

definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation." Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952).

Section 3142 provides no such concrete delineations. Rather, the statute is fatally vague, thereby offending the first "essential of due process." Connolly v. General Construction Co., 269 U.S. 385, 391 (1926). The section relies on the amorphous pronouncement that preventive detention should be ordered when no conditions of release will "reasonably assure the safety of any other person" or the "safety of the community." 18 U.S.C. § 3142(e).

The statute provides no other criteria and no guidance for applying the "safety" standard. The statute even fails to identify or to define what should be considered a

danger to the "safety of the community." The statute does not provide any criteria or direction to courts to determine whether the supposed danger exists. Moreover, the statute does not indicate what aspects of an individual's or of the community's "safety" are to be safeguarded. Although section 3142(g) enumerates factors to be considered, these factors either relate to the other grounds for detention or fail to provide meaningful explication. See, e.g., 18 U.S.C. § 3142(g)(4) ("nature and seriousness of danger").

Not only does the statute fail to indicate what type of offenses courts are to consider as jeopardizing the safety of the community, the judicial officer need not even conclude that the person is likely to commit any criminal offense. Thus, the statute utterly fails to "guide the judge in its application." Boyce Motor Lines, 342 U.S. at

340. Further, the vagueness of the statute fails to give the accused individual any notice of what he or she must rebut or establish to avoid being detained. Under the statute, defendant and counsel do not know how to prepare to defend against the charge of jeopardizing the "safety of the community." Essentially, they must prove that the defendant will not do anything "dangerous" in the future.

The vagaries of section 3142 place it well within the ambit of the kinds of enactments this Court has held invalid. Indeed, the failure of the statute is precisely the same as that of vagrancy laws consistently struck down by this Court: The impermissible goal of preventing future crimes based on general descriptions and predictions of behavior. See, e.g., Papachristou, 405 U.S. at 169 ("future criminality, however, is the common

justification for the presence of vagrancy statutes"); see also Foote, Vagrancy-Type Law and Its Administration, 104 U. Pa. L. Rev. 603, 625 (1955).

V. PREVENTIVE DETENTION VIOLATES THE EIGHTH AMENDMENT RIGHT TO BAIL

The Eighth Amendment protects an individual charged with a crime from imprisonment except when necessary to ensure his or her presence in court. See Stack v. Boyle, 342 U.S. 1 (1951); see also Hunt v. Roth, 648 F.2d 1148, 1164-65 (8th Cir. 1981) (eighth amendment implies right to bail), vacated as moot sub nom. Murphy v. Hunt, 455 U.S. 478 (1982) (per curiam).

The preventive detention sections of the 1984 Bail Reform Act depart from this Court's conclusion that there is a "traditional right to freedom before conviction." Stack v. Boyle, 342 U.S. at 4. Entirely ignoring this Eighth Amendment jurisprudence, the

government attempts to make much of the fact that the constitutional right to bail, like other constitutional rights, is not absolute.

One exception to the right to bail has long been recognized: A criminal defendant may be detained if the government can establish that there is a likelihood that, if released, the defendant will not appear for trial and will thereby prevent the court from determining innocence or guilt. See United States v. Winsor, 785 F.2d 755 (9th Cir. 1986). This exception stems from the purpose of bail -- to assure that a person will remain subject to the power and authority of the judicial process. See Ex Parte Milburn, 34 U.S. (9 Pet.) 704, 709 (1830). Thus, the courts and most commentators have concluded

that risk of flight alone is the historical explanation of the Eighth Amendment's exclusion of bail in capital cases. See Melendez-Carrion, 790 F.2d at 997-98; United States v. Edwards, 430 A.2d 1321, 1326 n.6 (D.C. App. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982); State v. Konigsberg, 33 N.J. 367, 164 A.2d 740, 743, (1960); Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 1223, 1230 (1969). Similarly, bail may be denied when there is substantial and specific evidence that the accused will undermine the system of justice by threatening or harming jurors or witnesses. See Melendez-Carrion, 790 F.2d at 1002.

In short, while the protection against incarceration without bail is not absolute, a compelling, constitutionally acceptable rationale must exist to deny an individual his liberty under the Eighth Amendment. This

reflects the overarching purpose and design of the entire Bill of Rights -- that the Government may not restrict important individual liberties absent certain vital and carefully circumscribed rationale. Nowhere is the protection of liberty more important -- nor was it of more concern to the Framers -- than in the confrontation between the State and the individual when the State attempts to deprive the individual of his or her life or physical freedom. The Framers recognized that the panoply of protections against government deprivation of liberty contained in the Bill of Rights would be rendered nugatory if a defendant could be detained on the basis of mere suspicions or predictions.

Thus, the Eighth Amendment's bail guarantee must be seen as part of the Framers' broader concern, deeply rooted in English and Colonial experience, that no

individual be physically detained and restrained by the state except under compelling circumstances. See id. at 997-98 (discussing historical roots of Eighth Amendment). The Eighth Amendment would itself be rendered nugatory were the government given the additional power to hold and incarcerate individuals because of allegations and suspicions -- especially allegations and suspicions of acts that the accused has not yet attempted, or even thought of, and which the individual's accusers need not articulate.

The Framers would have rebelled at such an assertion in 1787. While in our age, two hundred years later, the conventional wisdom is that there are no absolutes, still we cannot accept the Orwellian logic that there is no anomoly in an exception that swallows the rule. Section 3142 imposes punishment not for one's criminal acts, but for one's

status or alleged "tendencies" -- for being a "bad person" -- and thus constitutes an end run around the fundamental guarantees protecting citizens against governmental whim and oppression.

CONCLUSION

Under vague and formless criteria, the preventive detention provisions of section 3142 authorize the incarceration -- for an unspecified and indeterminate amount of time -- of individuals charged but not convicted of any crime. Implicitly, the statute authorizes judges and magistrates to decide that some members of our society are guilty of being "bad people." Judges and magistrates may order detention to incapacitate these "bad" defendants for months on end, and in some cases, for years.

Ours is a system committed to fairness, to restraints on government action, to protection of individual liberty. If one

stands back from the semantics of characterizing preventive detention as "regulation" or as "punishment," and looks at the issue itself, one grasps the harsh and frightening reality of what section 3142 attempts to legitimate: government detention and incarceration of individuals not convicted of any crime. Preventive detention undermines our understanding of what distinguishes the United States from many other countries in this world; this Court should not validate such a result.

Respectfully submitted,

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No. 86-87 (9)

Supreme Court, U.S.
FILED
DEC 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,

Petitioner,

—v.—

ANTHONY SALERNO AND VINCENT CAFARO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO *AMICUS CURIAE* BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION AND ACLU FOUNDATION OF SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENTS

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EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. ROBERT WALKER, Defendant-Appellee.	No. 86-5264 DC#CR-86-1134M-AWT Central California
UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. DUON WALKER, Defendant-Appellee	No. 86-5272 DC#CR-86-1133M-AWT Central California ORDER

Before: KOELSCH, ANDERSON and HALL, Circuit Judges

We find preventive detention under the Bail Reform Act of 1984, 18 U.S.C. § 3142(f), to be constitutional.

Appellant's motion for revocation of the release orders is granted. An opinion will follow.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 86-5273
Plaintiff-Appellant,	DC#CR-86-1139-AWT
vs.	
SANTIAGO CORTEZ RIVAS,	ORDER
Defendant-Appellee.	

Before: KOELSCH, ANDERSON and HALL, Circuit Judges

We disagree with the district court's factual finding that appellee poses a danger to the community.

Appellant's motion for revocation of the release order is denied. The case is remanded to the district court for appropriate conditions of release. U.S.C. § 3142(b) & (c).

EXHIBIT B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DUAN WALKER, Defendant.	NO. 86-1133M
UNITED STATES OF AMERICA, Plaintiff, v. ROBERT WALKER, Defendant.	NO. 86-1134M
UNITED STATES OF AMERICA, Plaintiff, v. SANTIAGO CORTEZ RIVAS, Defendant.	NO. 86-1139M MEMORANDUM ORDER ON REVIEW OF MAGISTRATE'S ORDER OF PERMANENT DETENTION

Each of these three cases is before the Court, sitting as the Criminal Duty Judge, pursuant to 18 U.S.C. §3145(b), on motions by the respective defendants for revocation of permanent orders of detention issued by a magistrate after hearing under 18 U.S.C. § 3142(i). In each case, the detention order is based only on the finding that "no condition or combination of conditions will reasonably assure . . . safety of any person or the community." And the government seeks affirmance of the detention orders solely on the basis of danger to the community.

No indictment has been returned in any of these cases. Defendant Duan Walker is charged in a criminal complaint with possession with intent to distribute of six kilograms of cocaine, in violation of 21 U.S.C. §841(a)(1). Defendant Robert Walker is charged in a complaint with conspiracy to distribute one kilogram of cocaine, in

violation of 21 U.S.C. §846. The affidavit in support of these complaints show that each defendant was armed. Defendant Rivas is charged by complaint with one count of bank robbery. 18 U.S.C. §2113(a). The proffered testimony of the investigating FBI agent is that Rivas committed numerous other bank robberies, as many as eight during a one-month period, and he was addicted to heroine and cocaine.

Detention was sought and ordered in these cases under §3142(f)(1)(C) with respect to both Walkers -- that 10+ year drug offenses were charged -- and under §3142(f)(1)(A) with respect to Rivas -- that "a crime of violence" was charged, as defined in §3156(a)(4). In each of these cases, considering the weight of the evidence against the defendant, his history and characteristics, the nature and circumstances of the offenses charged (including the

prescence of loaded firearms in the cases of the Walkers) (including the continued string of robberies by a drug addict in the case of Rivas) and that the offenses involved are either narcotic drug charges or crimes of violence, and the nature and seriousness of the danger to the community posed by each defendant's release, I find by clear and convincing evidence, on de novo review, that no condition or combination of conditions would reasonably assure the safety of the community if any of these defendants is released pending trial. §3142(e), (f) & (g). I agree with the magistrate that in none of these cases do the facts support a finding of likelihood of flight. The government does not contend that no condition or combination of conditions will reasonably assure the appearance of any defendant for trial.

The Court, thus, must confront the facial constitutional challenge made to §3142(e) by defendant Rivas. (Because the review of the Walkers' detention orders were before me at the same time, I cannot apply a different constitutional standard to their cases.)

Rivas contends that §3142(e) violates substantive due process, insofar as it permits pretrial detention of a defendant on the sole ground that his release poses a danger to any person or the community. As explained briefly below, I must agree with this contention; therefore, appropriate release orders will be issued in each case.

This Circuit has never confronted the issue. It has held the Bail Reform Act of 1984 constitutional in a different context -- that "pretrial detention based on risk of flight" does not violate the due process clause of the Fifth Amendment. United

States v. Winsor, 785 F.2d 755, 756 (9th Cir. 1986) (per curiam). See also United States v. Kouyoumdjian, 601 F.Supp. 1506 (C.D. Cal. 1985) (same); United States v. Freitas, 602 F.Supp. 1283,1291 (N.D. Cal. 1985) (not distinguishing between Act's goals of "safety of the community or the appearance of the defendant at trial"). The circuits which have directly addressed the issue are split. At least one circuit has clearly held that pretrial detention under §3142(e) reasonably to assure safety of the community does not violate substantive due process. United States v. Perry, 788 F.2d 100, 113 (3d Cir. 1986). See also United States v. Portes, 786 F.2d 758, 767 (7th Cir. 1986) (holding that substantive due process not violated; however, opinion does not make clear distinction between danger to community and risk of flight, both of which were involved).

On the other hand, the Second Circuit recently held to the contrary, that pretrial detention solely on the ground of danger to the community violates substantive due process, without regard to the probable length of that detention. United States v. Salerno, 794 F.2d 64, 71-75 (2d Cir. 1986). See also United States v. Melendez-Carrion, 790 F.2d 984, 998-04 (2d. Cir. 1986) ("plurality" opinon of Newman, J.) (same).

It is neither necessary nor useful for this Court to add further words to this debate, I am faced with the choice and must decide. I believe that the Second Circuit articulates the sounder constitutional view. I add only a word concerning Schall v. Martin, 467 U.S 253 (1984), although it is extensively discussed in all the cases, because it was heavily relied on by the government at the hearing. The constitutionality of pretrial detention in

these cases based solely on danger to the community cannot be bottomed on Schall. Its holding that pretrial detention of juveniles based on a finding of serious risk of the commission of another crime is based on one of the basic concepts of our society which has no application to adults. "The State has 'a parens patriae interest in preserving and promoting the welfare of the child,' which makes a juvenile proceeding fundamentally different from an adult criminal trial." Id. at 263 (citation omitted).

For the reasons articulated in Salerno, I hold that §3142(e) is unconstitutional in that it violates the Fifth Amendment's guarantee of substantive due process, to the extent that it authorizes the pretrial detention of an adult criminal defendant solely on the ground that "the safety of any other person and the community" cannot reasonably be assured. Appropriate release

orders will be issued in each case. The orders shall be stayed for a period of five (5) days to enable the government to seek appellate review, §3145(c), or a further stay pending appeal.

Dated: September 11, 1986

/signed/
A. WALLACE TASHIMA
United States
District Judge

CARL GUNN-DFPD

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. DUAN WALKER, Defendant.	NO. 86-113M AWT
UNITED STATES OF AMERICA, Plaintiff, v. ROBERT WALKER, Defendant.	NO. 86-1134M AWT
UNITED STATES OF AMERICA, Plaintiff, v. SANTIAGO CORTEZ RIVAS, Defendant.	NO. 86-1139M AWT SUPPLEMENTAL MEMORANDUM

This brief memorandum supplements the Memorandum Order on Review of Magistrate's Order of Permanent Detention, filed September 11, 1986. The Biweekly Custody Report referred to below is ordered filed under seal in No. 86-1139M AWT, subject to the right of counsel in each of these cases to have access to the sealed report.

It has been argued that it is inappropriate to question the constitutionality of pretrial detention without regard to the period of confinement because, inter alia, Congress, through the Speedy Trial Act, has insure that pretrial detention will be only for a minimal period. See, e.g., United States v. Melendez-Carrion, 790 F.2d 984, 1012 (2d Cir. 1986) (Timbers, J., dissenting); United States v. Accetturo, 783 F.2d 382, 387 (3d Cir. 1986). The experience in this district belies that contention.

As the Criminal Duty Judge, I have reviewed since July, 1986, the "Bi-Monthly [sic] Report of Defendants of California" (the "Biweekly Custody Report"), prepared by the United States Attorney and transmitted to the Criminal Duty Judge pursuant to F. R. Crim. P. 46(g). The latest such report is dated September 19, 1986, and lists all pretrial detainees as of September 17, 1986. I take judicial notice of this report, which is typical of prior reports.

I have reviewed the Biweekly Custody Report and made certain adjustments thereto. The adjustments made are deletions of: (1) material witnesses; (2) defendants awaiting a change of plea or subsequent proceedings, such as sentencing or appeal; and (3) those in state custody on other charges i.e., the adjustments are to reflect defendants awaiting trial or otherwise in a pretrial status. After such adjustments, the

report shows that there are 187 pretrial detainees in this district. Of that number, 51, or 27 percent, have been in custody for more than 70 days, i.e., their initial custody date predates July 9, 1986. Of the 51, 80 percent (41 detainees) have been in pretrial custody for more than six months, including two who have been in pretrial detenion for nearly one year (since October 10 & 11, 1985). Thus, it cannot realistically be contended that the Speedy Trial Act works evenly to insure that pretrial detention will be of such a short duration so as not to constitute punishment. Bell v. Wolfish, 441 U.S. 520, 535-40 (1979).

Dated: September 22, 1986

/signed/
A. WALLACE TASHIMA
United States
District Judge

EXHIBIT C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. [ROBERT WALKER] Defendant.	[86-1434m2] ORDER OF DETENTION AFTER HEARING (18 U.S.C. 3142(i))

A. ([X]) On motion of the Government involving an alleged

1. ( ) crime of violence;

2. ( ) offense with maximum sentence of life imprisonment or death;

[Note: Throughout Exhibit C, material enclosed within brackets, e.g., [. . .], appeared in handwritten form in the original. Full-sized copies of the originals have been lodged with the Court.]

3. ( ) narcotics or controlled substance offense with maximum sentence of ten or more years (21 U.S.C. §§801,/951, et. seq.,/955a);

4. ( ) felony - defendant convicted of two or more prior offenses described above.

B. On motion ([X]) (by the Government)/( ) (by the Court sua sponte involving)

1. ([X]) serious risk defendant will flee;

2. ( ) serious risk defendant will

a. ( ) obstruct or attempt to obstruct justice;

b. ( ) threaten, injure, or intimidate a prospective witness or juror or attempt to do so.

[3. (X) danger to community]

II.

The Court finds no condition or combination of conditions will reasonably assure:

A. ( ) appearance of defendant as required;

and/or

B. ([X]) safety of any person or the community;

III.

The Court has considered:

A. ([X]) the nature and circumstances of the offense;

B. ([X]) the weight of evidence against the defendant;

C. ([X]) the history and characteristics of the defendant;

D. ([X]) the nature and seriousness of the danger to any person or to the community.

IV.

The Court concludes:

A. ( ) Defendant poses a risk to the safety of other persons or the community because: [drug dealing in possession of guns]

B. ( ) History and characteristics indicate a serious risk that defendant will flee because:

_____

_____

_____

_____

C. ( ) A serious risk exists that defendant will:

1. ( ) obstruct or attempt to obstruct justice;

2. ( ) threaten, injure or intimidate a witness/juror

3. ( ) attempt to threaten, injure or intimidate a witness/juror;

Because: _____

_____

_____

_____

D. ( ) Defendant has not rebutted by sufficient evidence to the contrary the presumption provided in 18 U.S.C. §3142(e).

IT IS ORDERED defendant be detained prior to trial.

IT IS FURTHER ORDERED that defendant be confined as far as practicable in corrects facility separate from persons awaiting or serving sentences or persons held pending appeal.

IT IS FURTHER ORDERED that defendant be afforded reasonable opportunity for private consultation with his counsel.

DATED: 9-5-86

/signed/
U.S. MAGISTRATE/DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. [DUAN WALKER] Defendant.	ORDER OF DETENTION AFTER HEARING (18 U.S.C. §3142(i))

I.

A. ([X]) On motion of the Government involving an alleged

1. ( ) crime of violence;

2. ( ) offense with maximum sentence of life imprisonment or death;

3. ([X]) narcotics or controlled substance offense with maximum sentence of ten or more years (21 U.S.C. §§801,/951, et. seq.,/955a);

4. ( ) felony - defendant con prior offenses describ

B. On motion ([X]) (by Government)/( ) (by the Court sua sponte involving)

1. ([X]) serious risk defendant will flee;

2. ( ) serious risk defendant will

a. ( ) obstruct or attempt to obstruct justice;

b. ( ) threaten, injure, or intimidate a prospective witness or juror or attempt to do so.

[3. (X) danger to community]

II.

The Court finds no condition or combination of conditions will reasonably assure:

A. ( ) appearance of defendant as required;

and/or

B. ([X]) safety of any person or the community;

III.

The Court has considered:

A. ([X]) the nature and circumstances of the offense;

B. ([X]) the weight of evidence against the defendant;

C. ([X]) the history and characteristics of the defendant;

D. ([X]) the nature and seriousness of the danger to any person or to the community.

IV.

The Court concludes:

A. ([X]) Defendant poses a risk to the safety of other persons or the community because: [possession of guns by narcotic dealer.]

B. ( ) History and characteristics indicate a serious risk that defendant will flee because: _____

_____

_____

_____

_____

C. ( ) A serious risk exists that defendant will:

1. ( ) obstruct or attempt to obstruct justice;

2. ( ) threaten, injure or intimidate a witness/juror

3. ( ) attempt to threaten, injure or intimidate a witness/juror;

Because: _____

_____

_____

_____

D. ( ) Defendant has not rebutted by sufficient evidence to the contrary the presumption provided in 18 U.S.C. §3142(e).

IT IS ORDERED defendant be detained prior to trial.

IT IS FURTHER ORDERED that defendant be confined as far as practicable in a corrections facility separate from persons awaiting or serving sentences or persons held pending appeal.

IT IS FURTHER ORDERED that defendant be afforded reasonable opportunity for private consultation with his counsel.

DATED: [9-5-86]

/signed/
U.S. MAGISTRATE/DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff.	[86-1139m]
v.	ORDER OF DETENTION AFTER HEARING
[SANTIAGO CORTZ RIVAS] Defendant.	(18 U.S.C. §3142(i))

I.

A. ([X]) On motion of the Government involving an alleged

1. ([X]) crime of violence;

2. ( ) offense with maximum sentence of life imprisonment or death;

3. ( ) narcotics or controlled substance offense with maximum sentence of ten or more years (21 U.S.VC. §§801,/951. et. seq.,/955a);

4. ( ) felony - defendant convicted of two or more prior offenses described above.

B. On motion ([X]) (by the Government)/( ) (by the Court sua sponte involving)

1. ([X]) serious risk defendant will flee;

2. ( ) serious risk defendant will

a. ( ) obstruct or attempt to obstruct justice;

b. ( ) threaten, injure, or intimidate a prospective witness or juror or attempt to do so.

[3. (X) danger to community.]

II.

The Court finds no condition or combination of conditions will reasonably assure:

A. ( ) appearance of defendant as required;

and/or

B. ([X]) safety of any person or the community;

III.

The Court has considered:

A. ([X]) the nature and circumstances of the offense;

B. ([X]) the weight of evidence against the defendant;

C. ([X]) the history and characteristics of the defendant;

D. ([X]) the nature and seriousness of the danger to any person or to the community.

IV.

The Court concludes:

A. ( ) Defendant poses a risk to the safety of other persons or the community because: [serious narcotic addiction plus government alleges defendant is suspect in series of bank robberies.]

B. ( ) History and characteristics indicate a serious risk that defendant will flee because: _____

_____

_____

_____

_____

C. ( ) A serious risk exists that defendant will:

1. ( ) obstruct or attempt to obstruct justice;

2. ( ) threaten, injure or intimidate a witness/juror;

3. ( ) attempt to threaten, injure or intimidate a witness/juror;

Because: _____

_____

_____

_____

D. ( ) Defendant has not rebutted by sufficient evidence to the contrary the presumption provided in 18 U.S.C. §3142(e).

IT IS ORDERED defendant be detained prior to trial.

IT IS FURTHER ORDERED that defendant be confined as far as practicable in a corrections facility separate from persons awaiting or serving sentences or persons held pending appeal.

IT IS FURTHER ORDERED that defendant be afforded reasonable opportunity for private consultation with his counsel.

DATED: [9-4-86]

/signed/
U.S. MAGISTRATE/DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. [HECTOR HERMAN HOYOS] Defendant.	[86-1269M-8] ORDER OF DETENTION AFTER HEARING (18 U.S.C. §3142(i))

I.

A. ([X]) On motion of the Government involving an alleged

1. ( ) crime of violence;

2. ( ) offense with maximum sentence of life imprisonment or death;

3. ([X]) narcotics or controlled substance offense with maximum sentence of ten or more years (21 U.S.C. §§801,/951, et. seq.,/955a);

4. ( ) felony - defendant convicted of two or more prior offenses described above.

B. On motion ( ) (by the Government)/( ) (by the Court sua sponte involving)

1. ( ) serious risk defendant will flee;

2. ( ) serious risk defendant will

a. ( ) obstruct or attempt to obstruct justice;

b. ( ) threaten, injure, or intimidate a prospective witness or juror or attempt to do so.

II.

The Court finds no condition or combination of conditions will reasonably assure:

A. ([X]) appearance of defendant as required;

and/or

B. ([X]) safety of any person or the community;

III.

The Court has considered:

A. ([X]) the nature and circumstances of the offense;

B. ([X]) the weight of evidence against the defendant;

C. ([X]) the history and characteristics of the defendant;

D. ([X]) the nature and seriousness of the danger to any person or to the community.

IV.

The Court concludes:

A. ([X]) Defendant poses a risk to the safety [_____][1] of the community because: The presumption.

B. ([X]) History and characteristics indicate a serious risk that defendant will flee because: [likelihood of commitment and lengthy incarceration; citizenship and ties abroad]

C. ( ) A serious risk exists that defendant will:

[1] The words "other persons or" were here crossed out by the district court.

1. ( ) obstruct or attempt to obstruct justice;

2. ( ) threaten, injure or intimidate a witness/juror

3. ( ) attempt to threaten, injure or intimidate a witness/juror;

Because: _____

_____

_____

_____

D. ([X]) Defendant has not rebutted by sufficient evidence to the contrary the presumption provided in 18 U.S.C. §3142(e).

IT IS ORDERED defendant be detained prior to trial.

IT IS FURTHER ORDERED that defendant be confined as far as practicable in a corrections facility separate from persons awaiting or serving sentences or persons held pending appeal.

IT IS FURTHER ORDERED that defendant be afforded reasonable opportunity for private consultation with his counsel, [Mr. Kelly.]

DATED: [9/30/86]

/signed/
U.S. MAGISTRATE/DISTRICT JUDGE

MOTION FILED
DEC 18 1986

NO. 8687

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

VS.

ANTHONY SALERNO AND VINCENT CAFARO,
RESPONDENTS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Ina C. Brunwasser, Esquire
750 Washington Road #901
Pittsburgh, PA 15228

412-341-0125

ATTORNEY FOR AMICUS
CURIAE, HOWARD PERRY

I HEREBY CERTIFY THE WITHIN TO BE A
TRUE AND CORRECT COPY OF THE ORIGINAL
FILED IN THIS CASE
.....
ATTORNEY

IN THE SUPREME COURT OF UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA,	)	
	)	
PETITIONER	)	
	)	
VS.	)	no. 8687
	)	
ANTHONY SALERNO AND VINCENT CAFARO	)	

CERTIFICATION OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the Motion for Leave to File Amicus Curiae and Brief Amicus

Service by mail on December 30, 1986, three copies each to the following:

Anthony M. Cardinale, Esquire
11 Beacon Street
Suite 1220
Boston, MA 02108

Steven K. Frankel, Esquire
60 Hudson Street
Suite 2300
New York, NY 10013

Charles Fried, Esquire
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

December 30, 1986

Ina C. Brunwasser

Ina C. Brunwasser, Esquire

NO. 8687

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

VS.

ANTHONY SALERNO AND VINCENT CAFARO,
RESPONDENTS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Howard Perry, by his Attorney, Ina C. Brunwasser, respectfully files this Motion and Brief Amicus Curiae in support of Respondents Anthony Salerno and Vincent Cafaro.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

The Applicant, Howard Perry, a petitioner for a Writ of Certiorari before this Court (No. 86-5172, October Term 1986), whose petition was denied on October 6, 1986, hereby applies by Supreme Court Rule 36 (amicus briefs) and Rule 42 (motions) to file the brief of an amicus curiae on behalf of Respondents.

On November 14, 1986, Applicant, in accordance with Supreme Court Rule 36.2, requested the consent of all parties to the filing of an amicus curiae brief at No. 8687, October Term, 1986. On December 1, 1986, Anthony M. Cardinale, Esquire for Respondent Salerno, granted consent to Applicant's filing of an amicus brief. However, on

December 3, 1986, Charles Fried, Solicitor General of the United States, denied such consent. Although, as of the date of filing this motion, Steven K. Frankel, Esquire, Attorney for Respondent Cafaro, has not replied to Applicant's request, consent must be unanimous. Applicant is, therefore, filing the instant motion as required by Supreme Court Rule 36.3.

Applicant's Attorney, Inc. C. Brunwasser, was appointed to represent Howard Perry (forma pauperis) in a petition for Certiorari before this Court at No. 86-5172, October Term, 1986.

Applicant's interest in the case before this Court is to support the position of Respondents by presenting a brief supplementing questions already

submitted to the court and by addressing issues not yet addressed.

Howard Perry was indicted in November and December, 1985 for various drug offenses. Although the intricacies of his case are now irrelevant to the interest of am amicus curiae, the following procedural history of his litigation is necessary to explain his desire to participate.

Since Mr. Perry was charged for an offense punishable by imprisonment for ten years or more under the Controlled Substances Act (21 U.S.C. 801 et seq), he was subject to pretrial detention under the Bail Reform Act, 18 U.S.C. 3142 (e) [the Act]. Mr. Perry was required to rebut the Act's presumption of dangerousness only. Although the United

States District Court for the Western District of Pennsylvania by order of Judge Paul Simmons (December 6, 1985), held that Perry rebutted all presumptions of dangerousness, he has been incarcerated since December 10, 1985 because he was unable to secure the $100,000 bond required by the Court. Although the Court also declared the preventative detention features of the Act unconstitutional, the order does not specifically mention such a ground for decision.

On April 7, 1986, the Third Circuit of Appeals reversed Judge Simmons by holding that (1) The Act is not a violation of the Eighth Amendment, due process, equal protection or the Sixth Amendment (2) Perry failed to rebut the

presumption of dangerousness and, therefore will be detained. The Court did not address the issues of the alleged unconstitutionality of the disparate standards of appellate review employed by various federal courts or the questionable constitutionality posed by the system of presumptions used to detain defendants pending trial.

Perry was convicted at No. 85-263 of all but one charge in April of 1986. In May, Perry plea bargained the second charge (No. 253M). Both cases are now on appeal to the Third Circuit where Perry has asked for new trials. If his request is granted, Mr. Perry will again be subject to the pretrial detention features of the Act.

Although Mr. Perry has been

convicted and is only awaiting the possibility of a new trial (and, therefore, arguably not at present subject to pretrial bail), he asserts that his case is within the following exception cited in Murphy v. Hunt, 455 U.S. 478, 482, 102 S. Ct. 1181, 1183 (1982):

> "Even when no more relief may be granted to a plaintiff, a case may...remain viable on appeal if the problem presented is capable of repetition yet evading review. This standard applies if (1) the problem allegedly causing injury is resolved within too short a time period to ever be fully litigated and appealed and (2) the party seeking relief is likely to be subject to the same injury in the future."

See also, Sibron v. New York, 392 U.S. 40, 88 S. Ct. 1889 (1968); Roe v. Wade, 410 U.S. 113, 125, 93 S. Ct.

705, 712 (1973); Ameron Inc. v. U.S. Army Corp. of Engineers, 787 F.2d 875, 880-881 (3d Cir. 1986).

By comparing the factual situation in Ameron, Inc. v. U.S. Army Corp. of Engineers, 787 F.2d at 875, the most recent case in this Circuit to apply the Murphy v. Hunt rule, 455 U.S. at 478, 102 S. Ct. at 1181, to that of Applicant, it seems clear that Mr. Perry has standing to challenge "the Act". In the Ameron case, 787 F.2d at 881, the Third Circuit held that one prong of the Murphy v. Hunt test [problem resolved before litigation completed] was met, See 455 U.S. at 482, when an unsuccessful bidder challenged the constitutionality of the Competition in Contracting Act (CICA) 131 USCA 3553 et seq (West Supp. 1985), even

after the contract was awarded to another company. Since a bid protest will normally be resolved within 90 days, by the time a case can be appealed, it will almost always face the prospect of being regarded as moot.

Petitioner respectfully asserts that he also satisfies prong one of the Murphy v. Hunt test, 455 U.S. at 478. Because of the 70 day Speedy Trial Rule, every defendant must be brought to trial of his case plea bargained within 70 days. The constitutionality of "the Act" will forever evade review if technical aspects of our judicial system, intended to safeguard civil rights, are used to silence defendants on appeal.

The Third Circuit also held in the Ameron case, 787 F.2d at 881, that

prong two of the Murphy v. Hunt test for standing was satisfied [i.e., there was a reasonable expectation that this party would be subjected to the same action again]. Since the Ameron Company frequently sought government contracts, there was a high probability that it would again protest the awarding of a bid to a competitor. Petitioner contends that if one or both of his appeals result in a remand or new trial or if, in the future, he is charged with an offense under "the Act", he will again be held "dangerous" and be incarcerated.

Therefore, Applicant contends that he has a live interest before the Court either by reason of his pending appeals or as an exception to the rule in Murphy v. Hunt, 455 US at 482.

Respondents principally challenge the Act on due process grounds, Respondents' concern is that the Act punishes defendants by depriving them of liberty upon a mere prediction of future crime. Applicant supports Respondent in this issue. However, Applicant's Brief raises constitutional challenges to the Act which Respondents do not appear to raise. These issues, apparently not presented by the Respondents are:

1. Whether the United States Supreme Court should establish a national standard of appellate review for magistrates' detention orders under the Bail Reform Act (18 USCA 3142)?

2. Whether the Rebuttable Presumption (18 USCA 3142 (e)) is unconstitutional because facially vague

and must therefore be defined for the nation?

3. Whether "the Act" should be declared unconstitutional under the Fifth Amendment, even if the United States Supreme Court supplies a national definition of the term "presumption"?

4. Whether the United States Supreme Court should hold "the Act" unconstitutional when pretrial detention may be wholly founded upon oral testimony which can be rejected by the Court, thus allowing detention based upon a conclusive presumption?

Applicant contends that it is vital that the Court also consider these constitutional challenges to the Act.

In addition, on its facts, Mr. Perry's case illustrates that the Act is

not only detaining alleged high ranking crime figures merely on "clear and convincing evidence of future dangerousness" but also, and, it can be argued, principally, is being used against alleged "small time" criminals.

Applicant was unable to file this motion prior to public announcement on November 3, 1986 that the government's petition for certiorari had been granted.

It is, therefore, respectfully submitted that Applicant's Motion should be granted.

Respectfully submitted,

Ina C. Brunwasser

Ina C. Brunwasser, Esquire
Attorney for Amicus Curiae,
Howard Perry

750 Washington Road #901
Pittsburgh, PA 15228
412-341-0125

NO. 8687

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

VS.

ANTHONY SALERNO AND VINCENT CAFARO,
RESPONDENTS

BRIEF AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

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Perry was convicted at No. 85-263 of all but one charge in April of 1986. In May, Perry plea bargained the second charge (No. 253M). Both cases are now on appeal to the Third Circuit where Perry has asked for new trials. If his request is granted, Mr. Perry will again be subject to the pretrial detention features of the Act.

Although Mr. Perry has been convicted and is only awaiting the possibility of a new trial (and, therefore, arguably not at present subject to pretrial bail), he asserts that his case is within the following exception cited in Murphy v. Hunt, 455 U.S. 478, 482, 102 S. Ct. 1181, 1183 (1982):

> "Even when no more relief may be granted to a plaintiff, a case may...remain viable on appeal if the problem presented is capable of repetition yet evading review. This standard applies if (1) the problem allegedly causing injury is resolved within too short a time period to ever be fully litigated and appealed and (2) the part seeking relief is likely to be subject to the same injury in the future."

See also, Sibron v. New York, 392 U.S. 40, 88 S. Ct. 1889 (1968); Roe v. Wade, 410 U.S. 113, 125, 93 S. Ct. 705, 712 (1973); Ameron Inc. v. U.S. Army Corp. of Engineers, 787 F.2d 875, 880-881 (3d Cir. 1986).

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102 S. Ct. at 1181, to that of Applicant, it seems clear that Mr. Perry has standing to challenge "the Act". In the Ameron case, 787 F.2d at 881, the Third Circuit held that one prong of the Murphy v. Hunt test [problem resolved before litigation completed] was met, See 455 U.S. at 482, when an unsuccessful bidder challenged the constitutionality of the Competition in Contracting Act (CICA) 131 USCA 3553 et seq (West Supp. 1985), even after the contract was awarded to another company. Since a bid protest will normally be resolved within 90 days, by the time a case can be appealed, it will almost always face the prospect of being regarded as moot.

Petitioner respectfully asserts that he also satisfies prong one of the

Murphy v. Hunt test, 455 U.S. at 478. Because of the 70 day Speedy Trial Rule, every defendant must be brought to trial of his case plea bargained within 70 days. The constitutionality of "the Act" will forever evade review if technical aspects of our judicial system, intended to safeguard civil rights, are used to silence defendants on appeal.

The Third Circuit also held in the Ameron case, 787 F.2d at 881, that prong two of the Murphy v. Hunt test for standing was satisfied [i.e., there was a reasonable expectation that this party would be subjected to the same action again]. Since the Ameron Company frequently sought government contracts, there was a high probability that it would again protest the awarding of a bid

to a competitor. Petitioner contends that if one or both of his appeals result in a remand or new trial or if, in the future, he is charged with an offense under "the Act", he will again be held "dangerous" and be incarcerated.

Therefore, Applicant contends that he has a live interest before the Court either by reason of his pending appeals or as an exception to the rule in Murphy v. Hunt, 455 US at 482.

Respondents principally challenge the Act on due process grounds. Respondents' concern is that the Act punishes defendants by depriving them of liberty upon a mere prediction of future crime. Applicant supports Respondent in this issue. However, Applicant's Brief raises constitutional challenges to the

Act which Respondents do not appear to raise. These issues, apparently not presented by the Respondents are:

1. Whether the United States Supreme Court should establish a national standard of appellate review for magistrates' detention orders under the Bail Reform Act (18 USCA 3142)?

2. Whether the Rebuttable Presumption (18 USCA 3142 (e)) is unconstitutional because facially vague and must therefore be defined for the nation?

3. Whether "the Act" should be declared unconstitutional under the Fifth Amendment, even if the United States Supreme Court supplies a national definition of the term "presumption"?

4. Whether the United States

Supreme Court should hold "the Act" unconstitutional when pretrial detention may be wholly founded upon oral testimony which can be rejected by the Court, thus allowing detention based upon a conclusive presumption?

Applicant contends that it is vital that the Court also consider these constitutional challenges to the Act.

In addition, on its facts, Mr. Perry's case illustrates that the Act is not only detaining alleged high ranking crime figures merely on "clear and convincing" evidence of future dangerousness" but also, and, it can be argued, principally, is being used against alleged "small time" criminals.

STATEMENT

On November 21, 1985, a Criminal Complaint (No. 85-253M, Ct. of Appeals No. 85-85-3680) was filed charging Howard Perry and Gary Moore with conspiracy to possess heroin with intent to distribute in violation of 21 U.S.C. 841 (a)(1) [1982] and 21 U.S.C. 846 [1982].

Defendant Perry, thereby charged for an offense punishable by imprisonment for ten years or more under the Controlled Substance Act (21 U.S.C. 801 et. seq.), was subject to possible pretrial detention unless he was able to rebut the presumption of dangerousness under the Bail Reform Act, 18 U.S.C.A. 3142 (e) [the Act]. Such hearing was held on November 25, 1985. The

magistrate entered a detention order by virtue of 28 U.S.C.A. 636 (a)(2) [West Supp. 1985].

On November 27, 1985, defendant Perry sought review of the magistrate's order by the United States District Court for the Western District of Pennsylvania pursuant to 18 U.S.C.A. 3145 (b) [West 1985]. On December 5, 1985, District Judge Paul Simmons held a de novo detention hearing, which is the standard of review applied by the Third Circuit. On December 5, 1985, Judge Simmons held the Bail Reform Act substantively and procedurally unconstitutional and orally set bail at $100,000.

During the December 5, 1985 detention hearing before Judge Simmons, all parties learned of a second

indictment against Perry and others (No. 85-263, Ct. of Appeals No. 85-3671), handed down on December 2, 1985, charging them with conspiracy to distribute and possession with intent to distribute cocaine, marijuana and percodan. On the evening of December 5, 1985, Judge Simmons held a second detention hearing on the new charge. Both hearings involved the second rebuttable presumption situation triggered by 3142 (e) of the Act.

During the second detention hearing on December 5, 1985, the United States moved for a stay of the decision to grant bail, which the District Court orally denied.

On December 6, 1985, District Judge Simmons filed an order covering the

two detention hearings held on December 5, 1986. The order held that:

(1) Perry rebutted all presumptions of dangerousness

(2) The United States failed to present any evidence to discount Perry's testimony

(3) Perry would be released temporarily on his own recognizance until December 10, 1985 to secure a $100,000 bond ($50,000 for each indictment).

Although the Court had, in both hearings, declared the preventative detention features of the Act unconstitutional, the order does not specifically mention such a ground of decision.

Unable to secure the bond, Perry has remained in jail since

December 10, 1985.

Perry was brought to trial at No. 85-263 in April of 1986 and was acquitted of the percodan charge but convicted on all other counts. This conviction is now on appeal to the Third Circuit Court of Appeals. In May, Perry plea bargained the second charge (No. 253M). These facts are irrelevant to the constitutional issues raised by the Act's pretrial detention features but are only included as a complete factual synopsis.

The United States appealed the December 6, 1985 order of Judge Simmons in both cases and requested an emergency stay of the order granting release on bail. Perry's Counsel was given until December 13, 1985 to file an answer. However, on December 12, 1985, a panel of

the Third Circuit Court of Appeals granted a stay, prior to the period given Perry to file his answer and expedited the appeal. There was appellate jurisdiction by virtue of 18 U.S.C.A. 3145 (c) [West 1985] and 28 U.S.C.A. 1291 [West 1982].

Oral argument was held on January 17, 1986, subsequent to which the United States moved to dismiss its appeal in No. 85-263. On April 7, 1986, the motion to dismiss No. 263 was granted. Also, on April 7, 1986, after a de novo review of the District Court release order, by virtue only of case law, since no statutory standard of review has been established, see United States v. Coleman, 777 F.2d 888 (3d Cir. 1985) and United States v. Delker, 757 F.2d 1390

(3d Cir. 1985), the Third Circuit reversed Judge Simmons. The Appellate Court held:

(1) The act is not a violation of the Eighth Amendment, Due Process, Equal Protection or the Sixth Amendment.

(2) Perry failed to rebut the presumption of dangerousness and, therefore, will be detained. The Court did not address the issues of the alleged unconstitutionality of the disparate standards of appellate review employed by various federal courts or the questionable constitutionality posed by the system of presumptions used to detain defendants pending trial.

On April 30, 1986, a timely petition for rehearing was denied by the

Third Circuit.

On July 1, 1986, a petition for an extension of time within which to file the writ of certiorari was granted to and including July 29, 1986.

SUMMARY OF ARGUMENT

1. The Circuit Courts of the United States are applying disparate standards of review for magistrates' detention orders under the Bail Reform Act [18 U.S.C. 3142 (e)] because the Act is silent regarding the standard of review to be applied to these orders. A national standard of appellate review should be pronounced by this court to preserve uniform justice.

2. The Circuits, without

guidelines from the Act regarding the meaning of the word "presumption", are devising disparate procedural requirements. The initial constitutional problem is whether the term "presumption" requires defendants to meet the difficult "burden of persuasion" or only a "burden of production". There is also disparity regarding the procedure required under the "burden of production" standard.

It is urged that this conflict be eliminated by this Court's defining which of the two standards is meant and if the "burden of production standard" is approved, which of its several theories is meant by the Act.

3. Even if this Court supplies a national definition of the term "presumption", the Act should still

be declared unconstitutional.

Federal Courts have ruled presumptions violative of criminal due process. The Act is triggered by a criminal charge and, therefore, its presumptions appear to fall within the realm of criminal due process. However, although triggered by a criminal charge, the Act results in civil detention. Presumptions have also been held to violate the less stringent constitutional requirements of civil due process.

4. Pretrial detention can be ordered if the Court holds that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community..."

Because the Act does not

require any written evidence, oral testimony, alone, may be used to support the defendant's future capacity for dangerousness.

The rules of evidence allow the Court to totally reject even uncontroverted oral testimony which it views as inherently improbable, unreasonable or questionable.

If oral testimony is rejected, the "presumption" alone will result in pretrial detention.

ARGUMENT

1. Whether the United States Supreme Court should establish a national standard of appellate review for magistrates' detention orders under the Bail Reform Act [18 U.S.C.A. 3142 (e)]?

Although appeal from a

detention order, either that signed by a magistrate or district judge, is allowed by 18 U.S.C.A. 3145 (c), the Act is silent regarding the standard of review to be applied to these orders. The Act's legislative history makes no mention of this issue. See U.S. v. Delker, 757 F.2d 1390, 1394 (3d Cir. 1985). Without such guidance, the (federal) courts are forced to act beyond their authority as legislators. See Giaccio v. State of Pennsylvania, 382 US 399, 86 S. Ct. 518 (1966).

The Act's failure to provide any guidance to the courts in this regard has resulted in three different standards of review among the Circuits. The Third, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits apply a de novo

standard of review. See United States v. Delker, 757 F.2d 1390, 1399-1400 (3rd Cir. 1985); United States v. Hazime, 762 F.2d 34, 36-37 (6th Cir. 1985); United States v. Maull, 773 F.2d 1479, 1487 (8th Cir. 1985); United States v. Montamedi, 767 F.2d 1403, 1406 (9th Cir. 1985); United States v. Hurtado, 779 F.2d 1967, 1472 (11th Cir. 1985); United States v. Portes, 786 F.2d 758, 763 (7th Cir. 1985). As stated in Chrysler Corp. v. Brown, 441 US 281, 288, 99 S. Ct. 1705, 1711 (1979), de novo means "a whole new beginning". De novo review is the most harsh of the three standards for defendants to overcome. In the instant case (U.S. v. Perry), the de novo standard was applied both by the District Court and by the Circuit.

In the Second and Fourth Circuits, a district judge will not overturn the magistrate's detention or release order unless it is held "clearly erroneous". See United States v. Chimurenga, 760 F.2d 400, 405 (2nd Cir. 1985); United States v. Williams, 753 F.2d 329, 333 (4th Cir. 1985).

The First and Fifth Circuits have adopted the "supported by the proceeding below" standard of review. The order of the lower court (or magistrate) will not be overturned as long as it is supported by some evidence.

These disparate review standards result in unequal justice for defendants similarly situated. In addition, without guidance from the Act, judges are forced to legislate in

violation of the separation of powers doctrine.

Liberty, the most fundamental of constitutional rights, which is lost if pretrial detention is erroneously ordered, will be more uniformly preserved if this Court supplants the Act's silence regarding the standard of appellate review by a uniform rule.

2. Whether the rebuttable presumption [18 U.S.C.A. § 3142 (e) is

(a) Unconstitutional because facially vague and

(b) Must, therefore, be defined for the nation?

The Act, at 3142 (e) sets out two situations which trigger a presumption of dangerousness and/or flight which result in a defendant's

pretrial incarceration unless such presumption can be rebutted by "clear and convincing evidence".

In the instant case, Defendant Perry has standing to challenge the constitutionality of the second of these two rebuttable presumptions, although the same arguments relevant to Perry would apply to the first rebuttable presumption.

Once Perry was charged with a drug offense punishable by imprisonment of ten years or more by the Controlled Substances Import & Export Act (21 U.S.C. 955a), he was required to rebut the presumption of dangerousness by proving future model conduct (an almost impossible burden) or be incarcerated pending trial.

Since the Act, on its face, provides no guidelines regarding the meaning of the word "presumption", those federal courts which have been faced with a case under the Act, were forced to determine what procedure is required by the undefined word "presumption".

The initial constitutional problem is whether the term "presumption" requires defendants to meet the difficult "burden of persuasion" or only a "burden of production". In the former, the defendant must persuade the court of a future negative (that he will not be a danger, for example). In the latter, the defendant must only go forward with some evidence contrary to a presumed fact.

The confusion among the circuits as to the procedural

requirements of the Act's "presumption" is evidenced by the Third Circuit opinion in Perry. The government, in Perry, urged the Circuit to adopt the stringent "burden of persuasion" standard. Id. The Third Circuit's decision not to reach this constitutional question reveals the confusion which the Act's vagueness is causing. Other Circuits have raised this definitional problem but, like the Third Circuit, were able to bypass decision on the presumption issue by deciding the case on other grounds. See U.S. v. Leon, 766 F.2d 77, 81 (2nd Cir. 1985) and U.S. v. Hazime, 762 F.2d 34, 37 (6th Cir. 1985).

Although no circuit has yet defined "presumption" under the burden of persuasion standard, the Act's total

silence regarding the term's meaning allows for this result, unless the Supreme Court sets a national definition to assure uniform justice.

Even among those circuits which have, so far, held "presumption" to mean "burden of production", there is disparity regarding the procedure required even under the less stringent "burden of production" standard.

The circuits, at present, are applying the burden of production theory using two methods. The First and Fifth Circuits, for example, have held that the presumption is only one of several factors to be considered and is to be weighed equally with other rebuttal evidence submitted by the defendant. See United States v. Jessup, 757 F.2d 378

(1st Cir. 1985) and United States v. Fortna, 769 F.2d 243 (5th Cir. 1985). Other circuits are applying the less stringent "bursting bubble" burden of production presumption. Under this theory, the presumed against party must introduce some rebuttal evidence which production bursts the presumption. The judge (in a detention hearing) must then examine the evidence without any reference to the presumption. See Legille v. Dann, 544 F.2d 1, 6 (D.C. Cir. 1976).

The "bursting bubble" theory of presumptions is the most widely followed theory of presumptions in American law. See Legille v. Dann, 544 F.2d at 6. This standard has been adopted by the Federal Rules of Evidence. See FRE 301. The "bursting bubble" view of presumptions is

also the rule in the United States Supreme Court. See New York Life Insurance Company v. Gamer, 303 U.S. 161, 170-171, 58 S. Ct. 500, 503 (1938). "Presumption of death by accident rather than by suicide is not evidence and ceases upon the introduction of substantial proof to the contrary ... The presumption is not evidence and may not be given weight as evidence".

For these reasons, it is urged that, if the court is to approve any use of "presumptions" under the Act, the "bursting bubble" view should be adopted.

3. Whether the Act should be declared unconstitutional under the Fifth Amendment, even if the United States Supreme Court supplies a national definition of the term "presumption"?

The Fifth Amendment states:

> "No person shall be... deprived of life, liberty or property, without due process of law".

Several appellate courts have held presumptions to be due process violations under either the Fifth or Fourteenth Amendments.

Federal Courts have ruled presumptions invalid as violations of criminal due process. The only case, so far, which has held the Act unconstitutional (though on qualified grounds), is U.S. v. Melendez-Carrion, 790 F.2d 984 (2nd Cir. 1986). Melendez-Carrion, id., held that 3142 (e) of the Act violated due process, at least where such detention lasted for more than eight months. The Melendez-Carrion court did

not establish what constituted an "excessive period" of detention. However, the basis for the holding in Melendez-Carrion, 790 F.2d at 988, was the circuit's aversion to any conviction triggered by a presumption. The Melendez-Carrion court, 790 F.2d at 1004, cited Korematsu v. U.S., 323 U.S. 214, 65 S. Ct. 193 (1944) as "the only instance in the constitutional jurisprudence of this country (where)... the Supreme Court upheld the preventative detention of competent adults prior to conviction of any crime" and cited Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal 1984) which case made questionable whether preventative detention based upon presumption would be valid today, even under those facts.

Federal Court have held presumptions invalid as violations of criminal due process. See, for example, Commonwealth of Pennsylvania v Franklin, April 29, 1985, ___US___, 105 S. Ct. 1965 (a jury charge whereby defendant may rebut a presumption regarding intent violates the Fourteenth Amendment's due process clause). See also Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532 (1969) (The presumption in 21 U.S.C. 176 (a) whereby a possessor of marijuana is presumed to know of its unlawful importation violated the due process clause).

Although the Act is triggered by a criminal charge, it results in civil detention. Presumptions have also been held to violate the less stringent

constitutional requirements of civil due process. See Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332 (1958) [Requirements that taxpayer to win tax exemption, rebut presumption that he/she intends overthrow of Federal and/or State government by unlawful means held violative of Fourteenth Amendment due process]; Oyama v. State of California, 332 U.S. 633, 68 S. Ct. 269 (1948) [California alien land law whereby only aliens are presumed unable to transfer land to offspring held unconstitutional under Fourteenth Amendment]; Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972) [Presumption that unwed fathers are per se neglectful and, thereby, denied custody of their natural children deemed due process violation]; Heiner

v. Donnan, 285 U.S. 312, 52 S. Ct. 358 (1932) [Presumption that gifts made within two years of death are taxable as gifts made in contemplation of death violates due process).

It is urged that the Act's presumption, which can result in the loss of freedom, a most fundamental right, even more clearly violates due process.

4. Whether the United States Supreme Court should hold "the Act" unconstitutional when pretrial detention may be wholly founded upon oral testimony which can be rejected by the Court, thus allowing detention based upon a conclusive presumption?

The Act provides for a detention hearing (3142 (f)). Pretrial detention is ordered if the Court holds

the presumption unrebutted and presumes that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community..."

The Act does not require any written evidence. Therefore, oral testimony, alone, may be used to support the defendant's future capacity for dangerousness or for flight.

Even if this Court sets a national definition for the term "presumption", there is strong opposition to the use of even a rebuttable presumption as violative of due process.

Basic to the law of evidence is the rule that the court may totally reject even uncontroverted oral testimony

which it views as inherently improbable, unreasonable or questionable. See Quock Ting v. United States, 140 U.S. 417, 11 S. Ct. 733 (1891); Wooley v. Great Atlantic and Pacific Tea Company, 281 F.2d 78 (3rd Cir. 1960); Rhoades Inc. v. United Airlines Inc., 340 F.2d 481 (3rd Cir. 1965); Jones v. N.V. Nederlandsch-Amerikaansche Stoomvaart Maatshappij, 374 F.2d 189, 191 (3rd Cir. 1967). Wigmore noted this principle: The mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner". 7 Wigmore on Evidence, 3034 at 260-261 (3d ed. 1940). Further, the right to reject oral testimony is particularly appropriate when composed of opinion (testimony). See Wooley, 281 F.2d at 80.

If oral testimony is rejected, the presumption alone, already held violative of due process by many courts and triggered only by a charge under two federal acts [3142 (e)], will result in pretrial detention. It is especially likely that such oral testimony will be rejected (thereby foreclosing the possibility of rebutting the presumption) in cases under the Act. It is probable that judicial officers will discard the oral testimony of persons charged with serious firearms or drug offenses who have, as well, prior criminal records since the reliability of such testimony would be deemed "questionable" by most people.

In addition, as stated in Wooley, 281 F.2d at 80, opinion testimony

is particularly subject to rejection. Detention hearings under the Act are largely composed of opinions regarding the defendant's future conduct. In the instant case, the detention hearing was almost totally composed of oral testimony.

Since oral testimony largely constitutes detention hearings and is likely to be rejected under the Rules of Evidence, the Act's presumption, rebuttable in theory, becomes a conclusive presumption, in practice. It is urged that the Act is both overinclusive and a violation of due process. Since the Act calls for civil detention, thus eliminating the more stringent procedural safeguards requred in a criminal hearing [3142 (f)], there

is even greater danger in allowing these presumptions to stand.

In determining the constitutionality of the Act [3142 (e)], the words of In Re Winship, 397 U.S. 358, 372, 70 S. Ct. 1068, 1077 (1970) are instructive: "...it is far worse to convict an innocent man than to let a guilty man go free".

CONCLUSION

For the foregoing reasons, the Bail Reform Act, 18 USCA § 3142 (e), should be declared unconstitutional.

Respondents plus Howard Perry should no longer be detained under its provisions.

Respectfully submitted,

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